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DEPOSITION OF M. L. NEWELL

"Direct Examination

By Mr. Howard:

Q. Will you state your full name, please, and your residence address?

A. My name is Malcolm Lloyd Newell, and I live at 651 West 11th Street, San Pedro, California.

Q. Mr. Newell, by whom are you employed at the present time? A. By Mr. G. Scotti.

Q. In what capacity?

A. As engineer on a commercial fishing boat.

Q. Operating out of San Pedro?

A. That is right.

Q. Do you expect to be in the state of Washington in April—on or about April 6, 1949?

A. No, I do not."

Mr. Howard: May it please the Court, this witness in the following few lines waives the reading and signing of the deposition. We can start at line 15, [923] page 137.

"Q. Now, Mr. Newell, during the month of November, 1948, did you have occasion to render some service to the Tanker Urania?

A. Yes; I don't recall the exact dates, but I worked for approximately a week on the boat, that is, checking over it and inspecting the main engine, because of trouble that they had enroute.

(Deposition of M. L. Newell.)

Q. And by whom were you employed at that time?

A. I was employed at that time—I was still engineer on the job that I was fishing for, but I was employed then by the Union Diesel at that time; in other words, they contacted me, and then they sent two service men down from Oakland, and they had another service man down here who was also a commercial fisherman, who wasn't able to be there, and so they asked me if I would give them a hand on that job.

Q. Do you hold a Diesel engineer's license?

A. No, I do not.

Q. What is the extent of your experience in the operation of Diesel motors?

A. I have run Diesel engines on commercial fishing boats for the past five years.

Q. Have you had any particular experience with Union Diesel engines? [924]

A. Not particularly, no.

Q. By the way, are you related to Mr. S. W. Newell? A. Yes, that is my brother.

Q. Have you ever worked with the Union Diesel Engine Company at Oakland, California?

A. No, I never have.

Q. What would be your best recollection as to when you first went aboard the Tanker Urania, and where would the vessel be located at the time?

A. I went aboard the Tanker Urania the day and very shortly within the hour after it was towed back

(Deposition of M. L. Newell.)

from Mexico, and that was at the Craig Shipyards in Long Beach, California.

Q. Were you present when the ship arrived at the dock?

A. Yes, I was present when the ship arrived at the dock.

Q. Do you recall who else was present that went aboard the ship at that time?

A. Yes; there was one of the owners, Mr. Antippas, and a service man from the Union Diesel Company, and that was Mr. Charlie Firth, and Mr. Firth is now the chief engineer on the bait boat Mayflower.

Mr. Hokanson: I move that the last part of the answer be stricken as not responsive."

Mr. Howard: That is agreeable, Your Honor.

The Court: It will be stricken.

"Q. (By Mr. Howard): Where is Mr. Firth at this time?

A. I am not positive; in other words, he is either in San Diego or else on fishing grounds. He could be anywhere from San Diego to the Galapagos Islands.

Q. Was there anyone else in attendance at that time?

A. I don't recall exactly at that time, but I know from inquiring that there was a man from, I believe it was, the Texaco Oil Company; I can't recall his name, however.

(Deposition of M. L. Newell.)

Q. What were your particular responsibilities in connection with the difficulties on the main engine?

A. Well, my instructions from my brother were that they wanted to go over the engine thoroughly for any mechanical defects that might have caused the boat to break down in operation.

Q. State what condition you found the main engine to be in when you first went aboard the vessel when she arrived at Long Beach.

A. When we first went aboard the vessel at Long Beach, the engine had not been—that is, everything was still on the engine, and they hadn't started any work at all on it, and whether it would operate or not, I don't know.

Q. Was the engine being used as it came into port? [926]

A. When it came in, I don't know. I wasn't aboard. But at the time it arrived at the dock the engine was not running.

Q. What did you do when you first went aboard? Just tell us.

A. The first thing we did when we went aboard when she was docked was to open the base plates and inspect the crankcase.

Q. And in what condition did you find the crankcase?

A. We found the crankcase—that there was no indication of wear of anything there, such as if a bearing had been burned out, but the oil appeared to be contaminated.

Q. How much oil was there in the crankcase?

(Deposition of M. L. Newell.)

A. There was practically no oil in the crankcase. Those engines have a dry crankcase. All of the oil is pumped from the crankcase into the day tank, so they have a dry space in that type of engine, but there was oil in parts that don't drain; in other words, you might get oil for samples from that.

Q. Then what other parts of the engine did you inspect?

A. I inspected the thrust bearing. It is a Kingsbury thrust on that particular motor or engine, and I found that to be in—that is, it was in as perfect alignment as you could expect, and there was no indication of misalignment there." [927]

Mr. Hokanson: "There was no indication of misalignment there"—I move to strike the last part as not responsive. The first sentence of the answer is responsive, but the rest is not.

Mr. Howard: That is agreeable; he answers it in the next question.

The Court: It is stricken.

"Q. There was no damage found in the thrust bearing?

A. No damage found in the thrust bearing, no.

Q. Did you examine any other parts of the engine?

A. Yes; I myself put a test on the engine, which —in other words, we suspected water in the lubricating oil, and we put a test on the engine by seal-

(Deposition of M. L. Newell.)

ing the makeup water tank; in other words, that is a fresh water cooler at the engine, and it has a fresh water make up tank on the main deck, and that carries a little heat to the water, and I plugged up the discharge of that makeup water tank and turned the full fresh water supply—I don't know what poundage it was, but I believe it was approximately 45 pounds pressure—and so with the base plates off and with that much pressure in the engine, it would give us—that is, it would show us any leaks that you might have under normal operating conditions."

Mr. Hokanson: I move to strike all but the first part of his answer as not responsive.

The Court: All after the word "Yes"?

Mr. Hokanson: Yes.

Mr. Howard: I submit that is an objection that should have been raised at the time of the examination, and not at this time.

The Court: Because it relates only to form, is that your idea? Objections other than as to form are reserved, are they not?

Mr. Howard: The form of the question and the answer not being responsive.

Mr. Hokanson: That is not included in the stipulation, Your Honor, and if the witness goes on at length in answering the question I submit it is not.

The Court: Well, what is the nature of the answer? It simply describes what he did.

(Deposition of M. L. Newell.)

Mr. Hokanson: It goes on. I didn't complete reading his answer, apparently.

The Court: In the first place, I do not see any prejudice because it only tells you and the Court what he did in order to make his investigation. It is not saying that somebody was libeled for what he found or something like that, is it?

The objection is overruled. It seems to me to be merely an explanation that might not have been necessary of what he did and how he went about his job.

"And we found in No. 5 cylinder a slight leaking; in other words, it was very slight at that pressure; and as I recall it was about, oh, maybe 10 drops of water a minute, if that much.

Q. Now, where was this leak?

A. That was over No. 5 cylinder.

Q. Whereabouts?

A. Well, with the base plates off, all you could do was see it running down the side, and so we took out the lines that run into the cylinder wall from your lubricator—it is a Manzel lubricator.

Q. And what is that, a Manzel lubricator?

A. A Manzel lubricator is a lubricating box which by pressure feeds a small amount of oil to any given part of the engine. Each cylinder has two lines from the Manzel oiler, and they are external lines that help to lubricate the walls of the cylinder, and one of those external lines that comes

(Deposition of M. L. Newell.)

through the water jacket into the cylinder wall was leaking. In other words, there wasn't a proper seal on the copper gasket.

Q. Who was with you when you made that test?

A. I showed it to the chief engineer on the boat and to the other service man, Mr. Cross, who was the service man for the Union Diesel Company and who was on board the boat, and I don't recall who else I showed it to, but I made another gasket and put in or replaced that fitting that goes through the cylinder wall, and put it through the test, and it didn't leak after that.

Q. Do you recall whether Mr. Pike, of the American Bureau of Shipping, was present when you discovered that?

A. I don't recall whether he was there or not. I am pretty sure I told him about that, because he was around there and was very much interested.

Q. How did you discover that the gasket was bad?

A. I took out the fitting, and it is a soft copper gasket, and I could see that the upper halves of it were shiny. In other words, from the effect of screwing in that fitting. And then there was carbon on the lower part, showing that the fitting wasn't getting the proper seat against the gasket.

Q. And what effect did that have on the leakage of water?

A. Well, that would give you a slight amount of fresh water into your lube oil. I say slight, be-

(Deposition of M. L. Newell.)

cause this is merely my opinion. In other words, you can't tell exactly from a static pressure test how much it is going to be [931] leaking in actual operation.

Q. Did you relate that gasket to the water that you found in the cylinder?

A. Yes, to that particular part that was in the cylinder there.

Q. Did you find any other leaky gaskets?

A. No, that was the only leak from the engine itself.

Q. Now, just what was the condition of that gasket?

A. The gasket was—it retained the original shape—but part of the gasket was shiny and part of the gasket was black from carbon. That is what I would imagine it would be from.

Q. How thick was the gasket?

A. Oh, not more than a thirty-second of an inch.

Q. Was there any unevenness in the surface of the gasket?

A. No, there was no unevenness; in other words, nothing that I noticed, and we didn't lay it down or anything like that.

Q. Did you yourself replace that gasket?

A. Yes. I made a gasket out of a piece of copper because they didn't have any aboard, and we wanted to make a test of it, and so I made a gasket myself, and that would be on the No. 5 cylinder on the starboard side of the engine.

(Deposition of M. L. Newell.)

Q. Did you inspect any other parts of the engine? [932]

A. Yes; we inspected the—I think it was one of the main bearing shells, and also one of the crankshaft bearings.

Q. What did you find as to their condition?

A. We found their condition to be satisfactory. There was the presence of water behind the shells. In other words, the shells on the main bearing—that is not on connected bearings—but behind the shell there was water.

Q. Was that a normal condition?

A. No, that was not a normal condition, but the amount there would be dissipated in time and wouldn't cause any trouble.

Q. Would you state, please, on exactly what bearings, behind what shells, you found this water, if you can recall?

A. I think it was No. 6 main bearing.

Say, could I change something I said in my previous testimony? I was going on the wrong end of the engine. So instead of the No. 5 cylinder about which I previously testified, that should have been the No. 2 cylinder that had the leaky gasket.

Q. You were getting on the wrong side of the engine, were you?

A. Yes, I was on the wrong side of the engine.

Q. Then your previous reference to the leaky terminal and the gasket would be in regard to No. 2 cylinder? A. Yes. [933]

(Deposition of M. L. Newell.)

Q. And you wish to correct your previous statements relating to No. 5 cylinder, which should now be identified as No. 2 cylinder?

A. Yes. When I said No. 5 cylinder I meant No. 2 cylinder.

Q. Did you find any water on the thrust bearing?

A. No, there was no water in the thrust bearing. The thrust bearing has its own oil supply. In other words, it isn't lubricated by the same supply that lubricates the main engine. There is a tube or a pipe in the thrust bearing, so we took that apart and checked everything, and I cleaned out the thrust bearing, but there was no fissure present or any water there.

Q. Now, what other parts of the main engine did you examine?

A. Well, let me think a minute. We took off the heat exchangers, and my brother gave me the address, that is, he looked up to see who did the service work for the Harrison radiator, and I took in three heat exchangers, two for fresh water coolers and one for lubricating oil cooling, and I took those to the United Service in Long Beach, and they were to be cleaned and inspected and tested.

Q. Who removed the heat exchangers?

A. The crew of the boat removed them.

Q. That was after you arrived on board? [934]

A. Yes, that was after I arrived on board the ship.

(Deposition of M. L. Newell.)

Q. And did you personally take the heat exchangers?

A. Yes, I took them to the United Service at Long Beach.

Q. Were you present at the United Service shop when the heat exchangers were opened up?

A. No, I wasn't present when they were opened.

Q. Did you see the heat exchangers after they were opened up? A. Yes.

Q. Where were they then?

A. They were at the United Service shop, because I left them there and came back to the boat, and then I went back to the United Service again.

Q. Was it the same day that you did that?

A. No; the following day.

Q. You went back the following day?

A. I went back the following day, yes.

Q. Before the heat exchangers had been taken off the ship, had they been opened up in any way?

A. No. In other words, the only dismantling of the heat exchangers necessary to remove them from the piping of the ship was the unbolting of the flanges and taking them out as units.

Q. State what you observed as to the internal condition of the heat exchangers when you went back to the United [935] Service shop the following day.

A. When I went back to the United Service shop the following day, they were ready to test the heat exchangers. They had opened the heat exchangers

(Deposition of M. L. Newell.)

and had taken them apart. That means that they had taken the two end plates off of each heat exchanger, and they had boiled them in their solution that they use for cleaning radiators.

Q. And was the test run in your presence then?

A. The test was made in my presence, yes.

Q. And what did you observe during the test?

A. During the test the heat exchangers were immersed completely in the water and air pressure applied to the core of the heat exchanger.

Q. When you refer to the core, Mr. Newell, can you identify that a little further for us?

A. Well, I refer to the core—and I had better explain the type of heater. It was a Harrison heater, and that has a very compact heat exchanger and secured with a honeycomb core that is encased in a cast bronze casing, and the core is soldered or sweated into the casing.

Q. What do you mean by sweated into the casing?

A. That is the same as being soldered.

Q. And does the core refer to the tubing that the lubricating oil passes through?

A. That refers to the tubing that the lubricating oil [936] or fresh water passes through, yes. In other words, they pass through the honeycomb tubing and the water, that is, the salt water circulates around the outside of that, and the air was applied to where the salt water would be circulating through.

Q. And what, if anything, did you observe then?

(Deposition of M. L. Newell.)

A. I observed that there were a lot of leaks around the edge of the honeycomb core, right in the line of the solder marks where it was soldered into the casing. There were no leaks in the tubes themselves, but only around the edge of the tubes where they were soldered into the casing.

Q. Now, was this on the lubricating oil cooler or was it on one of the water coolers?

A. It was on all three of the coolers.

Q. Did the same condition exist on each of them?

A. The same condition existed on each of them and also on both ends.

Q. And how did you determine that there were leaks during this investigation?

A. I determined there were leaks because the cooler was completely submerged in water and there was air applied to the inside, so that there were bubbles coming up, and you could see where the bubbles came through the casing.

Q. After the coolers were removed from the water bath, did you make any further examination?

A. I examined the coolers for any sign of electrolysis, and there was no indication of electrolysis; and I examined the zinc plates that are put in each cooler to control electrolysis, and there were about—I would say approximately thirty per cent of the metal of the zinc left, and so I had those replaced.

Q. Were these leaks that you have referred to during the water and air test observable to the naked eye?

(Deposition of M. L. Newell.)

A. No, they were not observable to the naked eye.

Q. Visually you couldn't see them?

A. No, you couldn't see them.

Q. What arrangements did you make, if any, with the United Service Company?

A. Well, when I saw the leaks there, I asked them what, in our opinion, could be done about it, whether we should get new heat exchangers or not, and they said there was no reason for getting new heat exchangers, that their service man could repair them; and so I stood by while he repaired them and while the tests were made.

Q. How did he indicate where the leaks were?

A. He indicated the leaks by marking opposite where the air came through the jacket or through the core.

Q. Who was present during the time this test was made?

A. The service man, or the repair man, for the United Service Company. [938]

Q. Was anyone else present at the time?

A. Part of the time one of the service men of the United Service Company, who installs the radiators, was around, but he wasn't there all of the time.

Q. Were the repairs thereafter accomplished by the United Service Company? A. Yes.

Q. How long did it take?

A. Approximately a day—say eight hours.

(Deposition of M. L. Newell.)

Q. Did you return to the United Service Company after that?

A. Did I return? No, I picked up the—I don't recall whether it was the same day or the next day that I brought the heat exchangers back to the boat, but since then I haven't been back to the United Service Company.

Q. You did return to the boat?

A. I returned to the boat, yes. Of course, I paid for the work and returned the heat exchangers, and I gave them the bill and was reimbursed by the Union Diesel Engine Company."

Mr. Hokanson: I move to strike the last part as not responsive.

The Court: I think that it should be stricken.

Mr. Howard: It is not responsive, Your Honor.

The Court: It is stricken.

"Q. Do you recall what the charge was?

A. Let's see if I recall. I believe it was—I believe it was about $140. However, I can't be too sure on that. In other words, I don't remember, but that was approximately the charge.

Q. Was there a test made, any subsequent test made, on the heat exchangers at the United Service shop, before you turned them in to the vessel?

A. Well, they were tested after they were repaired. In other words, the service man would

(Deposition of M. L. Newell.)

mark the leaks and go ahead and solder them, and then put them back in the bath and test them again, and so when we finally found no leaks they were assembled and returned to the service man, and no other tests were made after that.

Q. Who reinstalled the heat exchangers on the boat?

A. Mr. Cross, Mr. Firth, and myself reinstalled them.

Mr. Howard: That is all. You may cross-examine.

Cross-Examination

By Mr. Hokanson:

Q. Mr. Newell, the core of the cooler that you have referred to is sweated into the casing on each end where [940] the lube oil comes in and goes out; is that correct?

A. No, I believe it is sweated on the ends where the water—that is, where the salt water goes in and out.

Q. Well, on the other side—in other words, the casing is really a chamber in which the core is contained, and it is only sweated in on two ends; is that correct? A. That is correct, yes.

Q. And when you remove the flange on the lubricating oil side, can you look into the chambers through which the lubricating oil runs?

A. You can look through part of it; you can't see all of it, but you can look through part of it.

Q. Now, on the salt water side can you see

(Deposition of M. L. Newell.)

A. The pressure we used for the test was higher than the pressure they had in the shop, yes.

Q. Do you know how many leaks there were in the lubricating oil cooler?

A. I think there were 13 leaks.

Q. Would that be in the lubricating oil cooler?

A. In the lubricating oil cooler there were six on one side and seven on the other. [943]

Q. And do you remember how many leaks there were in the other coolers?

A. Not exactly. They were all approximately the same, though.

Q. Could you give me any idea of the flow of the leaks in each case.

A. Well, we had no way of measuring the flow, but through most of the leaks there was a steady stream of bubbles, which would indicate quite a bit of leakage. In other words, like I say, we had no way of measuring it, and in operating conditions on the boat it depends on the pressure on each side of the heat exchangers how much leakage you are going to have.

Q. Do you know what the pressure was on this cooler—the operating pressure on the salt water side?

A. No, I don't. I don't know what the normal operating pressure was on that.

Q. What method is employed in this exchanger, if you know, to take care of the shrinkage of coils by reason of the heat?

(Deposition of M. L. Newell.)

A. There is none. Your differences of heat are so slight that in ordinary operation there wouldn't need to be any.

Q. In other words, the core of the cooler is sweated into the casing on two ends? [944]

A. That is right.

Q. And does not admit of any constriction or expansion in the core of the cooler itself?

A. No.

Q. So that if you would establish such differences in heating as would affect the natural expansion and contraction, it might conceivably break or disconnect the point where the solder is; isn't that correct?

A. Oh, if you go to extremes; but I don't believe myself that in normal operation there would be anything of the sort.

Q. Could you, by dropping these coolers, fracture your sweated joints?

A. Not without there being some evidence on the outside of the bronze casing, because those are very heavy casings. In other words, you wouldn't drop it and fracture it without denting it and showing something on the outside.

Q. Would you by constant vibration effect a fracture?

A. I don't know. I don't believe so, however.

Q. What, then, in your opinion, would be the cause?

A. I think, knowing some of the history of that

(Deposition of M. L. Newell.)

vessel, I think this freezing might really have caused it.

Q. Well, excluding that as a possible cause, are there any other causes that might bring out leakage at those points?

A. No, I can't picture or imagine anything that might cause it. In other words, electrolysis might, but there [945] were no indications of electrolysis in the heat exchangers. In other words, if there is electrolysis, it would show up elsewhere, and when they were resoldered there was no sign whatever of electrolysis.

Q. What is electrolysis?

A. Electrolysis is the eating away of the metal caused by the action of salt water on metal. In other words, it is a galvanic action; a curret set up by two different metals, and one metal may carry away from the other—whichever metal is more readily reacted upon. That is why zinc plugs or plates are put into these heat exchangers, because your zinc reacts to the electrolic action more than plates of bronze or admiralty metal. I don't know what the exact computation or percentage is, however.

Q. Is there any particular procedure for installing the cooler on the engine?

A. Yes; in other words, the cooler has to correspond with your salt water and your fresh water and your lubricating oil lines; that is, we merely unbolted the coolers from the lines that they were hooked up to, and they numbered the parts, and then

(Deposition of M. L. Newell.)

the coolers were disassembled, then later they were put back the same way, and we reassembled them where they were previously installed.

Q. Could any straining of the cooler in installation cause a fracture at the point of sweating? [946]

A. I don't believe so. I don't see how there could be a fracture—I don't believe there would be. In other words, you have your leaks so—you might say so unevenly divided, and on all ends of all three heat exchangers I just can't imagine where any bind or stress would cause that.

Q. You couldn't see the leaks visually, you say?

A. No, I could not.

Q. And in repairing them, the place where the leak appeared to be would be identified and soldered over at that point; is that right?

A. That is right.

Q. Did you, during the course of your testing, observe any sludge on the oil side?

A. You mean in testing—that is, you mean in the tank or on the boat, or where?

Q. Well, either place.

A. Either place—well, the answer would be no to both of those, because——

Q. From your own knowledge, of course.

A. Yes, from my own knowledge, but all the testing on the boat actually was done when the heat exchangers were all in place, and so we would have no reason for noticing the fact, and they weren't tested in the tank until—I mean at the shop until after they had been boiled out.

(Deposition of M. L. Newell.)

Q. And you were not there when they boiled them out? [947]

A. No, when they boiled them out, I was not there.

Q. You said the heat exchangers were not opened up before they were removed from the engine. You mean that the exchangers were not removed?

A. That is right.

Q. How are the coolers supported or mounted on the engine?

A. They are held mainly by the base, and I believe at one place they are bolted to the base of the engine.

Q. Could excessive vibration, in your opinion, cause leaks in these coolers?

Mr. Howard: That is objected to as repetitious."

Mr. Hokanson: That is agreed. I agree that the question has already been asked.

The Court: It will be stricken, and the answer, also.

"Q. You mentioned, Mr. Newell, that it was your knowledge that there was a man from the Texas Oil Company present with you when you went aboard the Tanker Urania after she docked.

A. Yes, that is right. [948]

Q. Do you know whether he took a sample of oil from the crankcase?

(Deposition of M. L. Newell.)

A. I don't recall whether he did or not. I believe that he did, however. I am not positive about that, though, but I believe that he did.

Q. You have mentioned that there was practically no oil in the crankcase since in this type of engine it was all pumped from the day tank, and did you take any sample of oil from the day tank?

A. I didn't take any samples at all, no.

Q. You mentioned the Kingsbury thrust bearing in your testimony. Do you refer now to the thrust bearing which controls the up and down play of the vertical shaft of the timing gear?

A. No; I refer to the Kingsbury thrust bearing as the thrust bearing that takes the thrust from the propeller shaft on your crankshaft—that would be the horizontal thrust.

Q. And there was no damage there?

A. There was no damage there, and it showed excellent alignment.

Q. That is, the crankshaft?

A. Yes, the crankshaft.

In other words, the engine in relation to the propeller shaft. [949]

Q. And how did you determine that?

A. I didn't make the actual test myself, but Mr. Firth made it—made the test and used a dial indicator, and he laid that dial indicator along the bed of the Kingsbury thrust shaft running horizontally with the top of the propeller shaft, and it showed no misalignment there.

(Deposition of M. L. Newell.)

Q. Did you observe Mr. Firth make this test?

A. Yes, I observed Mr. Firth make the test, and I noticed, that is, observed the readings on the dial indicator.

Q. You were aboard the ship on the 11th of November, too, were you? A. Yes.

Q. And how long did you work aboard the Tanker Urania?

A. Well, I—if the 11th was the day it came in then I worked aboard the Urania every day that it was in, excluding the day before it left.

Q. Was the engine jacked over or other alignment tests made?

Mr. Howard: Are you referring to any particular time, counsel?

Mr. Hokanson: At any time during this period.

A. Yes, we made a test; that is, when we made that test of the thrust bearing we turned the engine over. In other words, it is necessary to do that in order to get a complete test on your alignment of your engine. On various times it [950] was turned over in timing, etc.

Q. Did you inspect the camshaft in the course of your work on the boat?

A. I didn't inspect it myself, but it was inspected.

Q. Reverting back to the coolers and the tests that were made in your presence, could you give us an illustration or an analogy as to the amount of air that appeared to be leaking from the various leaks in the cooler? I had in mind, for instance, compar-

(Deposition of M. L. Newell.)

ing it with the type of air bubble you get in testing a puncture of an inner tube of an automobile tire. Would there be any way of comparing the amount of air emerging?

A. The tests, you might say, are similar, and you immerse both completely in water, and some of the leaks were—that is, they showed very fine. In other words, you might say almost—I don't know just how small you would say—but a little larger than a penpoint—maybe the size of the head of a match. All others were leaks that were considerably more than that.

Q. In terms of size, how many times bigger?

A. Maybe twice as big. True, they were not all the same size leaks, and they all were—when I speak of one leak, there might be half a dozen places along like a crack where they would be coming out. It wouldn't just always have a single leak coming from what I refer to as a leaking [951] cooler. There might be three or four places in that one location.

Mr. Hokanson: I have no further questions.

Redirect Examination

By Mr. Howard:

Q. Mr. Newell, from the time that you handled or examined the lubricating oil cooler, did you ever see any evidence that it had been dropped?

A. No.

Q. Or struck any place?

A. No; nothing external; everything was appar-

(Deposition of M. L. Newell.)

ently all right.

Q. Did you look for such damage?

A. Yes, sir.

Q. Now, these leaks that you mentioned and described the size as being the size of the head of a match, some of them, that is, are you referring to the opening, that is, just the leak itself, or are you referring to the size of the bubbles that emit from this leak?

A. I am referring to the bubble that came from the leak. In other words, you could not see the leaks by just examining visually.

Q. None of the leaks you have identified here would be as large as the head of a match, would they? A. Oh, no, not that large. [952]

Q. Was there any evidence when you first inspected the heat exchangers aboard the Tanker Urania that the unit had been removed or unbolted —unfastened recently?

A. No, there was—no, I would say not recently.

Q. Was there any evidence that the heat exchangers had been worked on?

A. No, there was no evidence of any work having been done on heat exchangers for quite some time."

Mr. Hokanson: I move to strike these questions as being not within the scope of redirect examination.

The Court: Beginning where?

(Deposition of M. L. Newell.)

Mr. Hokanson: Line 10, page 164 (line 1, page 953 of reporter's transcript).

Mr. Howard: If the Court please, counsel went into that subject on his cross-examination, questioned the witness as to whether there was evidence of the heat exchangers having been struck or damaged by any blow of any kind. I think it is appropriate to inquire of the witness on redirect further along this same line. The matter was brought up on cross-examination.

Mr. Hokanson: Your Honor, I believe Mr. Howard developed fully in his direct examination the removal of the heat exchangers from the vessel and the examination made by this witness, and now he pursues a line of [953] questioning with respect to that examination which is beyond the scope of the cross-examination and which was developed on direct.

The Court: Do you mean to say that in your last examination of the witness you did not go into the subject of unfastening the cooler by unbolting it, is that a part of your point?

Mr. Hokanson: My recollection is not clear, but I believe Mr. Howard established how they were removed and how they were replaced.

The Court: The objection is overruled.

"Q. Was there any evidence that it had been patched up at all, or soldered? A. No.

Q. Aside from the leaks that you discovered

(Deposition of M. L. Newell.)

when it was immersed in the water, would you say the heat exchanger was in good condition?

A. In splendid condition.

Q. The lubricating oil cooler and also the fresh water cooler? A. That is right.

Mr. Howard: That is all.

Recross-Examination

By Mr. Hokanson:

Q. Mr. Newell, you say there was no evidence that any work had been done on the coolers recently? A. That is right.

Q. You removed the cooler from the ship, although, as I recall, you stated that the crew actually unbolted it.

A. The crew unbolted the coolers, yes, that is right.

Q. And you didn't examine the coolers yourself until you saw them tested; is that correct?

A. No. I took them to the shop and I was there while they were partially unbolted. In other words, they were getting ready for the test then. I wasn't there as to all of it, but I was there through part of it.

Q. These tests were conducted, as I understand it, after the coolers had been boiled out.

A. That is right.

Q. So it wasn't until they were actually pressure tested that you made any inspection?

A. Of the internal part, yes. Of the external

(Deposition of M. L. Newell.)

part, when I was taking them up there—when they were taken off of the vessel.

Q. Well, how can you say that there was no work done on them?

* * *

"A. I will say that I believe there hadn't been, because of the bolts necessary to disassemble it, and that they hadn't been removed in quite some time. In other words, the paint on the heat exchangers was hardened so it would have been at least, in my opinion, a year—probably more; and the condition of the zinc inside, and there wasn't too much of the zinc inside, therefore if anybody serviced this recently, they would have replaced the zincs. In other words, things like that, whenever you are working on the zincs themselves, or whenever anything is apart, you replace your zincs on account of electrolysis, and you replace your gaskets in the heat exchangers.

Q. Did you watch the crew unbolt the heat exchangers?

A. I watched part of it. I didn't watch all of it.

Q. It was then that you noticed that the paint was hardened down where the bolts were?

A. No; I noticed in the shop of the United Service Company when they started taking the covers off of the heat exchangers.

Q. Do you mean the flanges?

A. No; I mean the covers. The flanges are built

(Deposition of M. L. Newell.)

onto the covers, and over the ends of the heat exchangers there is a plate with approximately, oh, maybe thirty three-eights studs and nuts holding that plate in place, and they had to [956] be removed, and in the middle of your plate there were flanges and they had to be removed in order to inspect them, at least the inside of the heat exchangers, and the condition of the nuts that they were cutting off, and you could tell that the paint had been hardened and that they had not been painted recently.

Q. Well, it was just your opinion that they had not been removed for about how long, would you say?

A. I wouldn't know for how long, but it would be my opinion that they had not been removed for at least a year.

Q. Now, you referred to putting the zincs in. What are the zincs?

A. In each of that particular type of heat exchanger there are, I believe, two zinc parts that constitute a plug of about three-quarters of an inch in diameter and approximately three inches long, which are sweated into a standard pipe plug and are screwed into the heat exchangers in the salt water flow—or the salt water part of the heat exchanger—and then also in the side of the heat exchanger on the covers—on two of the covers—are two single plates approximately, oh, three inches square and half an inch thick that can only be installed by disassembling the heat exchangers.

(Deposition of M. L. Newell.)

Q. Would it be customary to have to do that each time a cooler was removed? [957]

A Surely.

Q. You mean to make up new parts?

A. Either make them up or keep a supply on hand. In other words, get them from some source. You see, that is a condition that faces all vessels. In other words, some vessels have very little electrolysis and some have quite a bit.

Mr. Hokanson: No further questions.

Mr. Howard: That is all. Thank you very much, Mr. Newell."

Mr. Howard: That concludes the deposition of Mr. M. L. Newell. I offer it in evidence at this time.

The Court: It is received in evidence as a part of cross libelant's case in chief.

Mr. Howard: Next I would like to read the deposition immediately following, that of Mr. William Henry Weiler.

DEPOSITION OF WILLIAM H. WEILER

"Direct Examination

By Mr. Howard:

Q. Will you state your full name, please, and your residence address?

A. My name is William Henry Weiler. I live at 2573 [958] East 219th Place, Long Beach, California.

Q. By whom are you employed?

(Deposition of William H. Weiler.)

A. United Motors Service.

Q. In what capacity?

A. As a radiator repair man.

Q. And whereabouts is that place of business?

A. At 233 East Anaheim Street."

The Court: In what city is that, Long Beach or Los Angeles?

Mr. Howard: It is Long Beach, if the Court please.

"Q. How long have you been employed there, Mr. Weiler?

A. Let's see—two years and not quite three months. I came to work there January 2nd, I think it was, 1947.

Q. Mr. Weiler, do you expect to be in the State of Washington on or about April 6, 1949?

A. No, sir, I do not."

Mr. Howard: If the Court please, in the next few lines the witness does waive the reading and signing of the deposition. We can start at line 17, page 170. [959]

"Q. Do you recall an occasion last summer when a certain set of heat exchangers was brought to your plant by Mr. Newell?

(Deposition of William H. Weiler.)

A. I recall the heat exchangers were brought in, but who from I don't remember.

Q. How many of them were brought in at that time? A. I think four of them.

Q. And were those heat exchangers identified for you? A. What do you mean by identified?

Q. I mean were you told where they came from?

A. The understanding I got—the first understanding was that they were from the Marine Supply—now, that is the understanding I got, that that was where they were from. As far as that is concerned, I didn't sign the ticket to take them in, and I didn't sign the ticket to get them out, but I worked on them and that is all I know about them.

Q. What did you do with them?

A. Why, I boiled them out and tested them under pressure, and repaired them where they leaked.

Q. What did the boiling process consist of?

A. It consisted of putting them in a tank and boiling them to get the scale loose.

Q. For how long did you do that, approximately?

A. For three or four hours—something like that. As I had other jobs that would be ahead of them, I would leave [960] them so it wouldn't take so much longer.

Q. What is the solution or the fluid in the tank that they are boiled in?

A. L-27 radiator compound. It is a caustic

(Deposition of William H. Weiler.)

solution—that is what the people who sold it to us told us, at least.

Q. Well, before these heat exchangers were put in the tank for boiling, were they opened up in any way?

A. The plates were taken off of them, but that was done by some other fellows in the place.

Q. You didn't do that yourself?

A. No, I didn't do that work. The plates or side plates that go on them were removed so they could be boiled out and flushed.

Q. Now, the purpose of this testing—what did the test consist of?

A. The test consisted of putting the plates back on them and putting air pressure under them and submering them in water.

Q. What was the nature of the plates you put on them?

A. These were to trap the air in them; you put those on so as to keep the air inside of the tubes so that when you put the pressure on them, then if they leak they will bubble up through the water in which we submerged them.

Q. How did you hook the air up?

A. We have a compressor there. [961]

Q. Well, how is that air hooked up—that is, how was it hooked onto the heat exchangers?

A. Well, at the time—we have a gauge to set the pressure, but in this case the gauge—we didn't use that gauge because it didn't run the pressure up far enough. We removed the gauge and put it

(Deposition of William H. Weiler.)

directly on the line; in other words, we set it at about line pressure.

Q. Now, can you state whether the air was put on the lubricating oil or the water side of the heat exchangers?

A. I think it was on the water side.

Q. And can you state how much pressure, approximately, there would have been in the air that was applied directly from the line?

A. It was between 160 and 200 pounds—right in there. It was directly from the compressor, and the compressor varies right in there somewheres.

Q. And that was done as to each of the heat exchangers? A. Yes, sir.

Q. What did you find when the air was run through them?

A. Well, the only way I could describe it was surface leaks. There was no leaks down in the tube, but leaks on top, and as to whether I found any on just one, well, I wouldn't exactly say—I don't know if I found them on all of them or on some of them —I just don't remember how that was. [962]

Q. Do you recall how many leaks you found—just approximately.

A. No, I don't. I found some, but I don't know how many. That gentleman who just went out of here stood there while I was repairing them and testing them. I think that fellow is an engineer on some ship.

Q. Would that be Mr. Newell?

A. I don't know his name. All I know is that

(Deposition of William H. Weiler.)

he stood there with me, and he said he was off of a ship, and that they came from Alaska and had had trouble with salt water, and I was interested in them.

Q. Did this gentleman stay there all the time the test was made?

A. He stayed there on some of them, but as to him being there when the test was made on all of them or not, I just don't know. He was there part of one day and part of the next. I think he came back the morning when I was repairing one of them, and he stayed until I finished it, and then he left, and he came back and picked them up. I think he was the one that picked them up.

Q. You mentioned that there were some surface leaks on the heat exchangers. A. Yes.

Q. Tell us a little more what you mean by that.

A. Well, on a heat exchanger, you have tubes in them [963] and—well, like you are talking about the tubes—the salt water runs around these tubes and cools the oil. Well, there was no leaks as evidenced by the method I tested the inside of the tubes with. All I found were on the surface and down in the seams.

Q. Had those seams already been soldered?

A. Well, they were soldered at the time, but they leaked.

Q. How large a leak would you say you found?

A. I don't know how to describe it. They just leak or they don't leak.

Q. Could you see the leak visually?

(Deposition of William H. Weiler.)

A. Yes, you could see the bubbles coming up from in the water.

Q. You could see the bubbles? A. Yes.

Q. Could you actually see the holes in the seams?

A. No holes—they were such high pressure that it wouldn't take much of a seam to—that is, much of an opening for them to leak.

Q. Do you recall whether there were leaks in each heat exchanger?

A. No, sir, I don't. I don't remember the leaks at all. I would say I had three of them, or something like that, but I don't know if there were leaks in each one of them or not. [964]

Q. What did you do to correct the situation you found in those tests?

A. Well, we repaired them—that is about all.

Q. But how?

A. Well, in the places that leaked, the old solder was removed and they were heated and new solder sweated in, and then they were retested again to see if they got it.

(Discussion by counsel off the record.)

Mr. Howard: May I have that answer read again, please, Mr. Reporter?

(The last answer given by the witness was read by the reporter.)

Q. How did you determine where to make the repairs?

A. When they were tested under air pressure and submerged, the water bubbles where there are

(Deposition of William H. Weiler.)

the leaks.

Q. Then you marked them where the bubbles originated?

A. No, not exactly marked them, but I just remembered where the place was.

Q. What were the results of your tests made after the removal of the old solder and putting in the new solder?

A. The final test was that they didn't leak. In soldering something like that, there is many times that the first time you solder it you won't make it. You will have to go back and sweat it in again. You just may not make it the first time. [965]

Q. Was there any evidence that these heat exchangers had been repaired recently?

A. None that I could tell.

Q. Did you see any evidence of any other damage to the heat exchangers?

A. Not at the time I didn't.

Q. Was there any evidence on the casing that any of the heat exchangers had been dropped or struck anything?

A. Not at the time I was working on them in the shop.

Mr. Howard: That is all. You may cross-examine.

Cross-Examination

By Mr. Hokanson:

Q. Do you remember the lubricating oil cooler?

A. Well, I remember there was some lubricating

(Deposition of William H. Weiler.)

oil coolers and some heat exchangers. One was from water to water, and another was from water to oil.

Q. Well, now, were all of these coolers of the same type?

A. They were approximately the same size as would be apparent to the eye. I never measured them, however.

Q. Well, are they heavy?

A. I should say they are.

Q. How much would they weigh, each, approximately?

A. I would say about 40 pounds disassembled, that is, with the plates off of the sides.

Q. When you say the plates off of the sides, do you [966] meant he plates to which the flanges are attached?

A. Well, yes, those flanges—circular flanges on each plate that are attached to the heater exchangers—I don't remember right off whether all of them had plates on them or not. I know some of them did, and possibly all of them did. Two other fellows in the place took the plates off and disassembled them and brought them to me, and I boiled them and repaired them, and then they put the plates back on them.

Q. Now, when you boiled these—what temperature did you use in that operation?

A. We used boiling temperature—212 or thereabouts.

Q. 212 degrees Fahrenheit?

A. Yes, 212 degrees Fahrenheit.

(Deposition of William H. Weiler.)

Q. And I believe you said that the solution in which they were boiled was called L-27 radiator compound? A. Yes.

Q. And you were advised from your office or from the one who purchased it that this was caustic?

A. That is what I understand, that it was caustic.

Q. Now, did you immerse the whole heat exchanger in the solution when you boiled it?

A. Yes.

Q. And for how long a period of time did you boil them?

A. From three to four hours—right in there.

Q. I am not altogether clear as to the construction of these heat exchangers that you cleaned. When you put them into the solution, are they partly in a casing?

A. Let me think how to answer that question. Well, they are disassembled, as far as nuts and bolts go; I will put it that way.

Q. They still have the casing on the outside which contains the fluid which flows through on either the salt water or the lubricating oil side?

A. It has a casing on the outside and has continuous tubes on the other side, and some tubes have salt water and some tubes fresh water and some oil—whichever one it is.

Q. Now, when you introduced these heat exchangers into the solution, is the thing boiling at that time?

A. Well, it may or it may not be.

Q. Do you remember whether it was in this case?

(Deposition of William H. Weiler.)

A. No, it wouldn't be.

Q. Well, now, I want you to answer from your recollection and not by reasoning it out, Mr. Weiler.

Mr. Howard: Let him finish his answer, counsel.

The Witness: Well, I know it wouldn't be, because if it was boiling and you raise the lid on the tank, all of the steam will come right up in your face, so, anyway, every time I go there I cut it off to reduce the boiling so that I can at least get it in the tank, and that is another thing [968] that I will put in the tank with a hoist.

Q. That would be still high temperature when you introduce them into the tank?

A. Yes, I would say it was around 180—something below boiling.

Q. So you wouldn't have the steam in your face?

A. Yes.

Q. And then you would increase it to boiling?

A. Yes; I would close the lid and increase the heat.

Q. Now, do you have a good enough recollection of the construction of these particular coolers so that you could draw me some pictures of them?

A. Well, an amateur picture, I would call it.

(Discussion off the record while pen and paper are furnished witness, upon which he draws certain diagrams.)

(The diagram so drawn by the witness was thereupon marked by the reporter as "Libelants' and Cross-Respondents' Los Angeles Exhibit B.")"

(Deposition of William H. Weiler.)

(Drawing marked Libelants' Exhibit 15 for Identification.)

"Q. (By Mr. Hokanson): Mr. Weiler, I am handing you what has been marked by the reporter for identification as Libelants' and Cross-Respondents' Los Angeles Exhibit B for [969] identification, and I will ask you what that exhibit shows (handing diagram to witness).

A. Well, it shows—it has three drawings, one of them shows a picture of the heat exchanger——

Mr. Howard: Which one is that?

The Witness: That is number "A."

Diagram A shows a picture of the heat exchanger as you look on the oil side.

Diagram B is a picture outside looking at it from the salt water side, and Diagram C represents a drawing of a single tube on the heat exchanger.

Q. (By Mr. Hokanson): And you have sketched these pictures roughly yourself, have you?

A. Yes, that is right.

Q. You have designated the first drawing as Diagram A, and that, as I understand it, represents a cross-section view of the lubricating oil cooler which we are talking about here, from the oil side? A. Yes.

Q. Now, would you please draw an arrow there and number it "1," making the arrow point to one of the tubes which you look into as you look into the cross-section which is marked as Diagram A on your sketch?

(Deposition of William H. Weiler.)

A. All right (witness complies).

Q. Now, can you draw an arrow and mark it number "2," [970] showing the place where the tubes are, or where the chamber is wihch contains the tubes, which is fastened to the housing?

A. That is the plate that contains the tubes and is fastened to the housing (indicating on diagram).

Q. Now will you indicate by another arrow and by the figure "3" the housing in which these tubes are fastened in here?

A. Yes (witness complies).

Q. Mr. Weiler, I notice you have put a number of little holes or circles in the area which represents the housing. Would you please draw an arrow to one of those holes and mark it with the figure "4" and state what those holes or circles represent?

A. Yes (witness complies). Those holes have bolts placed through them, which hold the plate to the housing.

Q. Now, you have also drawn on this exhibit Diagram B, and as I understand it, that represents a cross-section view of the lubricating oil cooler looking into it from the salt water side.

A. That is right.

Q. And will you indicate on the diagram there where the housing is—indicate on Diagram B, and put an arrow with the number "5" there?

A. Yes (witness complies).

Q. And would you indicate by another arrow the tubes [971] through which the oil flows and mark that number "6"?

(Deposition of William H. Weiler.)

A. Yes (witness complies).

Q. Now would you indicate by another arrow and the number "7" the area in which the salt water flows?

A. Yes (witness complies).

Q. And would you indicate by another arrow in one of the circles that you have drawn in the area represented as the housing—draw the arrow and indicate it by the figure "8"?

A. Yes (witness complies).

Q. And what does number 8 represent?

A. That is the hole through the housing through which the bolt passes that holds the plate to it.

Q. You have also another diagram on the sketch which you have drawn, and which has now been marked as "C." State what that indicates?

A. That is an enlarged drawing of a tube of the heat exchanger looking from the oil side.

Q. In other words, what you have marked with the letter "C" is an enlarged view of what you have marked as No. 1 on sketch A?

A. Yes, that is right.

Q. And that is the tube from the view that you would have looking into it?

A. Yes, from the oil entry side. [972]

Q. You say from the oil entry side?

A. Yes.

Q. Now, looking into sketch A, or picture A, as you call it, can you state how the tubes which are shown there are secured in the housing?

(Deposition of William H. Weiler.)

A. They are—the tubes are—well, they are soldered to the housing.

Q. But they do not actually touch the housing, which is marked number 3, do they?

A. Oh, they touch it through the medium of the solder. The solder holds that. There is solder between the tubes and the housing.

Q. And that solder is only at the end of the housing where the tubes enter into the oil chamber; is that correct?

A. Well, those tubes are just secured by solder on the oil entry side of the heat exchanger; is that what you mean?

Q. Is there any plate which holds them at that end?

A. Well, yes, there is a plate there—the tubes are soldered to a plate, which in turn is soldered to the housing.

Q. Well, looking at figure B, that plate would be a vertical line at either end of figure B, would it not? A. Yes.

Q. And this plate on which the tubes are fastened is securely riveted to the housing? [973]

A. Yes.

Q. And in figure B the point which you have identified as the number 6 represents a rough idea of the tubes running transversely through the chamber which contains the oil, although the oil is not visible to the naked eye when looking into figure

(Deposition of William H. Weiler.)

B, but you merely see the outside of the tube; is that correct?

(Discussion by counsel off the record.)

Q. Is that correct,——

Mr. Howard: Obviously, I will have to object to that question——

(Further discussion by counsel off the record.)

Mr. Hokanson: Well, I will strike the last question.

Q. What you have identified, Mr. Weiler, as figure 6 on sketch B is what?

A. That is an oil tube—that is a tube which contains oil on the inside and salt water passes over it on the outside when the motor is in operation.

Q. I note that you have drawn some lines through 6. What does that represent?

A. That is a shaded area to show the oil passing through the tube.

Q. But that oil is not actually visible when you look in the picture?

A. Not from the salt water side, it isn't. The oil [974] itself isn't, no.

Q. Well, what is No. 7 on sketch B?

A. That is the space between the tubes through which the salt water flows.

Q. Well, looking at it from the side—as we look at it, the water would be flowing into those areas, or out, as the case may be?

A. It would be going over and through that area.

(Deposition of William H. Weiler.)

Q. Now, the lines that you have drawn through the picture—the diagram C on your sketch—that represents what?

A. Well, they are pieces of metal put in the tube to help cool the oil off.

Q. Do they act as compartments within the tube?

A. Well, they more or less separate it—not all the way through the tube, but at various points on it——

Q. In other words, they are not solid all the way through the tube from one end to the other?

A. Well, I don't know. I never looked down in them.

Q. Now, can you point out on this sketch where the leaks were found that you have testified to?

A. Well,——

(Discussion off the record.)

Q. I wonder if you would mark it in red pencil with an arrow to the point where one of these leaks occurred, [975] if you can remember?

A. Well, as to whether it occurred on a heat exchanger that had oil in it or not, I just don't know. I don't remember that.

Q. Well, with respect to all of this that you cleaned, were the leaks located in the same area—that is, the same general area?

A. They were leaks between the plate and the housing, and I don't remember exactly if there were any leaks—I think there were—between the tubes

(Deposition of William H. Weiler.)

themselves on some of them—on the surface, but not down on the inside of the tubes.

Q. There were no leaks, as you recall it now, in the tubes themselves? A. No, sir.

Q. And you can't remember specifically where the leaks occurred on the lubricating oil coolers; is that correct?

A. No, sir. I repaired them, but I don't remember how many lubricating oil coolers there were. I would say approximately that I repaired three or four of them, or maybe two of them. I don't remember clearly on that now.

Q. Lubricating oil coolers?

A. No, there were four coolers there, I believe, and I repaired some of them—all of them—but I don't just remember exactly about all of them now.

Q. Well, were there leaks at the points which we have marked with the figure 2 on your sketch A, which is the point where the plate containing the tubes is soldered to the housing?

Mr. Howard: If you know.

A. Yes, on some of them there were.

Q. (By Mr. Hokanson): Well, you can't state definitely whether there were leaks at other points on the lubricating oil cooler, can you?

A. I can state definitely that there were leaks where these pipes joined the housing, and that there may have been leaks between the tubes, but if there were they were repaired. That is why I said in the beginning that they were surface leaks. They were

(Deposition of William H. Weiler.)

on the surface. There was no fracture, as my test showed, in the tubes themselves. The fracture was in the solder.

Q. Between the housing and the plate or the tubes and the plate?

A. I don't remember that correctly.

Q. In other words, you definitely know that on some of these heat exchangers that you cleaned there were leaks at the figure 2 on sketch A?

A. Well,—Now, we don't have a sketch of a heat exchanger with its water to water transfer, and I don't know whether they were on the one that carried oil or not. [977]

Do you mean if I made a remark that they carried a leak and I meant that the lubricating one leaked, or what?

Q. Well, if you can't remember, I wouldn't ask you to commit yourself on it now. I thought, though, that you testified definitely that on some of these heat exchangers the leaks were definitely on the point where the plate was soldered to the housing.

A. Yes, they were.

Mr. Howard: May I question him for a moment?

Mr. Hokanson: Yes; certainly.

Q. (By Mr. Howard): This position represented on your series of sketches and more particularly sketch A, point 2, that would be the same on both a lubricating oil and a water cooler, would it not? A. Yes, it would.

Q. So that, although the interior would be dif-

(Deposition of William H. Weiler.)

ferent on the water cooler, this would be the same (indicating on diagram)? A. Yes.

Q. (By Mr. Hokanson): So that when you point out the position at A-2 as the location of some leak, you are not sure whether that was in the water or the lubricating oil? A. That is true.

Q. But it was on that location on one or two of the coolers at least, that you recall? [978]

A. Yes, that is right.

Q. Now, when you immersed the heat exchangers in this solution for boiling, they were contained in the housing, which is represented here on the exhibit that you have drawn; is that correct?

A. When I immersed the what?

Q. When you put these heat exchangers in the solution to boil them out, they were contained in the housing, were they not?

A. Do you mean the tubes were contained in the housing at the time I put them in the tank to boil?

Q. Yes. A. Yes.

Q. And had you tested them before you boiled them? A. No, I had not.

Q. But you tested them after boiling them, did you? A. Yes.

Q. By putting them in a tank of water and running air through on what side?

A. The salt water side.

Q. Now, were there any signs of corrosion of the solder in your examination?

A. Well, the test we gave doesn't definitely show that the solder itself is corroded. It shows if there

(Deposition of William H. Weiler.)

is a leak in it which can be caused by corroded solder and [979] adhering to the housing up by the plate. But as to a test to show whether the solder was corroded or not—we didn't make that kind of a test.

Q. Now, have you on other occasions cleaned heat exchangers taken from vessels?

A. Yes, sir.

Q. And is the method you used the method prescribed for cleaning these heat exchangers?

A. Well, it is the method we use.

Q. You have to do this also for automobile radiators, do you not? A. Yes.

Q. Do you know whether leaks would be occasioned in the soldering by the boiling process?

A. The company that sells the L-27 radiator compound claim when they sold it that they investigated and that it doesn't affect soldering. That is what they claim.

Q. What about the temperature?

A. The temperature wouldn't have anything—Well, how do you mean the temperature?

Q. Well, the temperature of the solution.

A. Would the temperature in itself affect the solder; is that what you mean?

Q. If you know. Have you ever had the experience of testing it out to determine it by putting a heat [980] exchanger in the solution heated to 212 degrees Fahrenheit, to see if that would cause the leaks in itself? A. No, sir.

(Deposition of William H. Weiler.)

Q. You never determined that?

A. Well, I have never made a scientific test of it, no, sir.

Q. The metal from which the housing is made is not the same kind of metal as the tubing, is it?

A. I don't know.

Q. Well, do you know whether the shrinkage caused by high temperature in the metal which the tubes are made from is any different than the shrinkage or expansion of the metal from which the housing is made?

A. Well, I believe both metals are both the same metal, and any shrinkage or expansion there would be caused by reason of a different quality or thickness of the metal itself, if there was any, and as to how much I just don't know.

Q. How thick, if you know, are the plates which you have referred to in your earlier testimony, in which the lubricating oil tubes are fastened?

A. I don't know that either.

Q. Do you have any idea?

A. Well, I would say approximately maybe a quarter of an inch—something like that—maybe an eighth of an [981] inch—but I think around a quarter of an inch. I am not positive on that, however.

Q. Do you remember how large the air bubbles were coming out of these leaks?

(No answer by the witness.)"

(Deposition of William H. Weiler.)

Hr. Howard: That is objected to as repetitious.

Mr. Hokanson: This witness has not testified.

The Court: The objection is overruled.

"Q. To assist you in answering that, if you are able to answer it, could you compare it to the bubbles that one might see coming from a leak in an automobile inner tube that has been immersed in water?

A. The bubbles in the tire's inner tube would be greater and faster than the bubbles in something like that. This is just a guess, you know. I don't know exactly how big the bubbles were, but I would say about the size or the thickness of a pencil lead, or something like that.

Q. And you took off the gauge, as I understand it, and ran the pressure through from the line?

Mr. Howard: That is objected to as repetitious."

The Court: The objection is overruled.

"A. Yes.

Q. (By Mr. Hokanson): And I understand that you said in your testimony that the pounds of pressure ranged from 160 to 200 pounds?

Mr. Howard: That is objected to as repetitious."

(Deposition of William H. Weiler.)

The Court: Overruled.

"A. Yes, that was about it.

Mr. Hokanson: I have no further questions.

Mr. Howard: That is all I have."

Mr. Howard: That concludes the deposition of Mr. Weiler. I offer it in evidence at this time.

The Court: It is received as a part of cross libelant's case in chief.

Mr. Hokanson: At this time, Your Honor, the libelants and cross respondents offer in evidence Exhibit 15, which is the sketch identified by the witness Weiler in testifying concerning the coolers.

Mr. Howard: No objection.

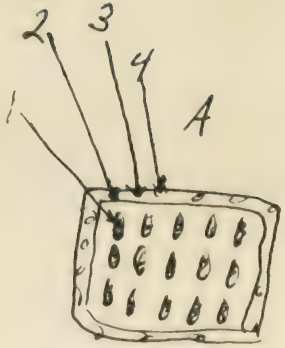
The Court: Admitted.

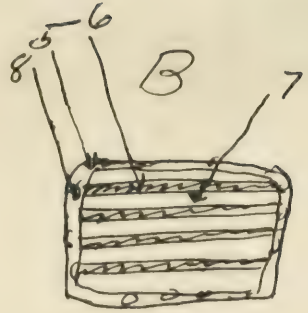
(Libelants' Exhibit 15 received in evidence.)

12322

LA-B
W. L. H.

CAUSE 15766
LIBELANT EXHIBIT 15
ADMITTED APR 13 1949







Libelants and Cross-Respondents
Exhibit # "Los Angeles-B"
for identification.
W. L. Heartfield, N. P.
March 25, 1949

Mr. Howard: At this time, cross libelant would like to read the deposition of Mr. Pike, beginning at page 79 of the large volume of depositions.

Line 17, page 79.

DEPOSITION OF E. W. PIKE

"Direct Examination

By Mr. Howard:

Q. Will you state your full name and residence address, please, Mr. Pike?

A. Edwin W. Pike, 286 Ravena Drive, Long Beach, California.

Q. What is your occupation, Mr. Pike?

A. Surveyor for the American Bureau of Shipping.

Q. And at what port do you act for the American Bureau of Shipping?

A. Well, it is called Los Angeles; it is Long Beach, Wilmington, and San Pedro.

Q. Mr. Pike, do you expect to be in Seattle, Washington, or or about April 6, 1949? [984]

A. No, sir."

Mr. Howard: If the Court please, the witness in the next few lines does waive the reading and signing of his deposition. We can start at line 18, page 80.

(Deposition of E. W. Pike.)

"Q. Mr. Pike, do you recall the Tanker Urania?

A. Yes, sir.

Q. Will you state when your first contact with that vessel occurred? A. November 11, 1948.

Q. And what services were you requested to perform at that time?

A. I examined the main engine for breakdown——

Q. Was the Tanker Urania classified by the American Bureau of Shipping? A. Yes, sir.

Q. In what class—how do you describe the classification?

A. Well, it is what we call a cross A-1-3 oil carrier.

Q. At whose request did you inspect the Urania?

A. At the request of the General Steamship Corporation.

Q. State, if you can, the date when you first went [985] aboard the Tanker Urania and where the vessel was located at that time?

A. It was on November 11, 1948, at the Craig Shipyards, Long Beach, California.

Mr. Howard: Mr. Reporter, may we have this document marked as an exhibit next in order.

(The documents were marked by the reporter as 'Claimant's and Cross-Libelant's Exhibits X-1 and X-2 for Identification.')"

(Deposition of E. W. Pike.)

(Survey report marked Respondent's Exhibit A-21 for Identification.)

"Q. State, if you can, any other persons present at the time you went aboard the vessel on November 11, 1948.

A. Mr. Harry J. Summers, Mr. Antippas, Mr. R. H. Hanna, and Mr. George M. Dupuy.

Q. Handing you what has heretofore been marked by the reporter for identification as Exhibits X-1 and X-2, will you state what that is, please (handing documents to witness)?

A. That is my report on the Tanker Urania to my New York office.

Q. And when was that report prepared?

A. November 17, 1948. [986]

Q. Did you attend the vessel on subsequent occasions after November 11, 1948? A. Yes.

Q. On what dates, please?

A. I don't have the exact days——

Q. What is your best recollection?

A. There were six visits, and it was from November 11 to November 17, 1948.

Q. Six visits from November 11 to November 17, 1948?

A. Yes. Some of those were—that is two of them were at night—late visits they call them.

Q. Did your inspection and survey of the Tanker Urania extend beyond the condition of the main engine? A. No, sir.

(Deposition of E. W. Pike.)

Q. Will you state, please, what condition you found the main engine of the Tanker Urania to be in on your first inspection on November 11, 1948?

A. Well, through the inspection plate the timing gears were badly worn, galled and destroyed.

Mr. Howard: May I have that answer again, please?

(The answer of the witness was read by the reporter.)

Q. Mr. Pike, will you amplify what you mean by through the inspection plate?

A. They have to open the inspection plate on the lower casing of the crankshaft—or the casing of the engine, so [987] that you can see into it.

Q. Was that opened up when you arrived on board the vessel?

A. I can't remember, but I believe it was. There was a workman from the manufacturer, I believe.

Q. What was the type of main engine that was installed on that vessel?

A. The name of it, you mean?

Q. Yes. A. The Union Diesel Engine.

Q. Do you have the horsepower of that engine?

A. 560 horsepower.

Q. Well, can you tell us a little more as to the state the vessel was in, that is, as to the condition of these timing gears?

A. Well, they were badly chewed up—badly worn out.

Q. Were the upper gears in the same condition as the lower gears?

(Deposition of E. W. Pike.)

A. Well, I would say about the same—they were all chewed and worn badly; I have it here (referring to report), "4 helical timing gears destroyed."

Q. Will you go on, please, to describe any other conditions that you found aboard the vessel in the main engine on that first inspection on November 11, 1948? You may refer to the survey report that we have identified, [988] Mr. Pike, if you wish.

A. Well, let's see; due to that condition, we started searching for further trouble, such as the crank bearings and the main bearings, and we took a sample of the oil in the casing and the sump of the casing.

Q. Was there a considerable quantity of oil in the crankcase?

A. No, not much, but in the sump—we pumped a sample of that out and found salt water in it.

Q. How did you determine there was salt water in it? A. We tasted it.

Q. And how was the sample obtained from the sump?

A. We call it a squirtgun—it is a pump gun.

Q. Did you preserve any sample?

A. No.

Q. What condition did you find the other bearings that you referred to to be in, the main bearings; what condition were they in?

A. They were found to be satisfactory.

Q. There was no evidence of any damage to

(Deposition of E. W. Pike.)

those gears? A. No.

Q. Did you examine the terminals leading into the cylinders for lubricating oil?

A. No. 2 cylinder, the water jacket terminal showed signs of leaking. [989]

Q. Did you personally examine that?

A. Yes, sir.

Q. And what evidence was there of leakage?

A. Well, the gasket was destroyed, and the crust destroyed on the side.

Q. Can you locate that gasket for us more particularly? Was it on the outside of the cylinder or between the cylinder and the liner?

A. It goes through the cylinder into the liner—the end was the side of the cylinder.

Q. Was the gasket you found destroyed on the outside of the cylinder or on the inside of it?

A. On the inside of it.

Q. Had that been opened up before you arrived aboard the vessel? A. I am not sure.

Q. What type of gasket was that, Mr. Pike?

A. It was a metallic gasket.

Q. Can you tell us a little more about the condition of that gasket that you found?

A. Well, I just can't remember the condition. I saw it, and it was just another gasket, and I threw it away and prepared for a new one.

Q. Now, from your examination of that particular part of the engine and No. 2 cylinder, could

(Deposition of E. W. Pike.)

you tell whether [990] there had been a leakage of some fluid?

A. Yes, there was water running down the side of the cylinder.

Q. Running down the side of the cylinder or the liner? A. The liner—driblets of water.

Q. Did you observe that water yourself when you inspected the engine? A. Yes, I did.

Q. What was the condition of the liner itself?

A. It was satisfactory.

Q. Was there any apparent damage to the liner?

A. No.

Q. Could you state whether the water you found inside the liner was fresh or salt water?

A. I did not determine that.

Q. You are acquainted with the construction and operation of Diesel engines, are you not?

A. Yes, I would say so.

Q. From your knowledge of Diesel engines, will you state where that water would have drained to that you found on the inside of the cylinder liner?

A. Down into the base of the engine.

Q. Well, is there any other fluid contained in the base of the engine?

A. The lubricating oil. [991]

Q. So that this water that was draining would drain down into the chamber that contained the lubricating oil? A. Yes.

Q. What type of connection was there in the cylinder or cylinder liner where you found this

(Deposition of E. W. Pike.)

destroyed gasket? A. I can't remember.

Q. Was it threaded?

A. Yes. It wasn't necessary to go that far into it at the time.

Q. Did you personally examine the lubricating oil cooler aboard the tanker on your first inspection? A. Yes.

Q. What condition did you find in the cooler on your examination? A. Well——

Q. Can you describe the cooler to us—just very briefly?

A. I would like to say that when we open coolers like that, there is a certain amount of ordinary dirt that collects in there, but that is satisfactory; it is not too bad, as far as dirt is concerned.

Q. Would that be in the salt water side or the lubricating oil side?

A. The salt water side.

Q. Well, how could that affect the operation of the cooler? [992]

A. Oh, it didn't hurt it.

Q. Can you proceed now, Mr. Pike, to describe what you found the condition to be upon inspection of the cooler?

A. The cooler was taken ashore and tested and found weeping—well, not bad leaks, but just leaking, and it was decided to take it to the service shop that built them, I believe it was, and overhaul it and put it in good condition again.

Q. Was the cooler tested in your presence?

A. No, we didn't put that information down on this report (indicating document). The Union Oil

(Deposition of E. W. Pike.)

Service man—the Union Diesel service man does.

Q. Did you verify that the cooler was actually leaking, or weeping, from your own personal inspection? A. Yes.''

The Court: Court will be in recess until 1:30 this afternoon.

(At 11:55 o'clock a.m., Wednesday, April 13, 1949, proceedings recessed until 1:30 o'clock p.m., Wednesday, April 13, 1949.) [993]

April 13, 1949, 1:30 o'clock, p.m.

Mr. Howard: Page 88, line 14.

''Q. And that was after it had been removed from the vessel? A. Yes.

Q. And where was it located then?

A. In the shop.

Q. Of the Craig Shipbuilding Company?

A. It wasn't—I mean it wasn't the final test. They took it up there, and they reported to me a total of thirteen leaks in the two coolers.

Q. In the two coolers, did you say?

A. Yes.

Q. Now, that refers to just the lubricating oil cooler, or to the fresh water cooler?

A. Two of them.

Q. And the thirteen leaks were discovered in both coolers? A. Yes.

Q. Were all of the coolers removed from the vessel? [994]

(Deposition of E. W. Pike.)

A. No, not all of them; just the two.

Q. That would be one fresh water cooler and one lubricating oil cooler? A. Yes.

Q. Do you know how many of those thirteen leaks were found in the lubricating oil cooler?

A. No; only from verbal conversation, that is, between the Union Diesel man and myself.

Q. Will you describe for us, Mr. Pike, from your own personal observation, where the leaks were found in the lubricating oil cooler?

A. We call it the tube sheet.

Q. Can you amplify that for us as to where that would be?

A. Not knowing the terms of the manufacturer—it is the corrugation plates fastened together. I don't know whether you would call it sweated together or soldered together, or what.

Q. Is it where the joint occurs?

A. Yes, where the joint occurs.

Q. At the seams? A. Yes.

Q. And what was the nature of those leaks that you found?

A. Well, as I say, it just weeps, and by weeping—well, that is in marine terms; in other words, it is not a stream. [995]

Q. The leaks were located by circulating some fluid through there and determining where the fluid penetrated through the tubing or the sheet; do I understand you correctly on that?

A. Yes. Ordinarily the repairs would have been

(Deposition of E. W. Pike.)

done right at the shipyards, but, as I understand it, it is the Union Engineering Company's procedure to take those things to the manufacturer for such service.

Q. Do you recall whether there was a representative of the Union Diesel Engine Company present at the time you made your inspection aboard the tanker Urania?

A. Yes; Mr. S. W. Newell.

Q. And was there anyone else present from the Union Diesel Engine Company that you recall?

A. Not by name—but two or three men.

Q. Two or three other men that you don't recall by name? A. That is right.

Q. Did you examine the vertical shaft of the main engine? A. Yes.

Q. And what condition did you find it in?

A. We put it in the lathe to check for true, and it was satisfactory.

Q. There was no misalignment or bend at all?

A. No. [996]

Q. What recommendations did you make, Mr. Pike, as to the conditions that you found in the main engine of the Tanker Urania after your initial inspection?

A. Well—the damaged gears to be removed and replaced, and the water jacket and gasket removed, and the coolers cleaned, tested and repaired; clean out the sumps or the pit of the engine; open up No. 6 cylinder, No. 7 cylinder, main thrust cylinder,

(Deposition of E. W. Pike.)

overhead camshaft journals; main bearings opened for examination and found satisfactory. And I recommended the vertical shaft be removed to the shop and checked for alignment.

Q. And that was done, was it?

A. Yes.

Q. And the other items that you have mentioned just above were also performed?

A. Yes.

Q. And did you also recommend that the lubricating oil in the crankcase—lubricating oil should be flushed out? A. Yes.

Q. And was that done?

A. Yes; any damage of that sort, we search around in the vicinity for anything that may be the cause or be one of the causes.

Q. Did you have occasion to check the various items of work that you have just mentioned during the progress of [997] the work?

A. Yes, every day I was there. As I say, I haven't got time to do it, but we run around to the different jobs, and I watched the progress of it there.

Q. After the repairs had been completed, were you present aboard the vessel during the dock trial?

A. Yes, I had a dock trial and I had a sea trial.

Q. Let's take the dock trial first.

A. Yes.

Q. Do you have the date of that?

A. No, I haven't.

(Deposition of E. W. Pike.)

Q. But you recall that——

A. I can give the approximate date.

Q. All right, please do so.

A. The approximate date would be the 16th of November.

Q. Well, for how long were the engines run at that time?

A. Well, I examined them for probably two hours, but they had been run for several hours.

Q. How did the main engine perform on that occasion? A. Fine.

Q. Did you check them to determine whether there was any unusual noise? A. Yes.

Q. In the bearings, I mean. A. Yes. [998]

Q. And in the gears.

A. Yes; all over it, while she was running—we go all over.

Q. And did you find any such noise?

A. No; nothing.

Q. Did you find any evidence of any malfunction of the engine? A. No, sir.

Q. On that occasion did you check the lubricating oil? A. Yes.

Q. And was there any evidence of contamination?

A. No, sir; you wouldn't detect it that quick, but there wasn't anything.

Q. But you did check for that?

A. Yes; and I examined the coolers.

Q. What did you find upon your examination of the coolers?

(Deposition of E. W. Pike.)

A. They were fine—that is, they were satisfactory.

Q. Are you acquainted with the pressures that are maintained in the coolers?

A. I am not very familiar with that particular fact—I don't remember offhand the pressures.

Q. During the time that you were on board the Tanker Urania for these various inspections, did you observe whether an operation manual provided by the manufacturer [999] was carried aboard the vessel?

A. Well, I feel quite sure I saw one.

Q. Did you have an opportunity to observe the manner in which the chief engineer of the Tanker Urania was performing his duties above the vessel?

A. Yes, I do recall——

Q. First, what nationality was he?

A. I believe he was a Greek. He couldn't talk English very plain, but the manner in which he worked was all satisfactory.

Q. You have been around Diesel ships a good deal, have you not? A. Yes.

Q. Foreign ships as well as United States flag vessels? A. Yes.

Q. You have seen a good many engineers functioning aboard these ships? A. Yes.

Q. State from your experience whether you would consider this chief engineer whom you found aboard the Tanker Urania was qualified.

(Deposition of E. W. Pike.)

Mr. Hokanson: I shall object to the question as leading."

The Court: Do you object to his qualifications to [1000] comment upon that?

Mr. Hokanson: No, the objection was made to the form of the question, Your Honor.

Mr. Howard: There is another question below which goes to the same point.

Mr. Hokanson: I will waive the objection.

"The Witness: I cannot answer that. He was a good engineer, but as far as his qualifications are concerned, I couldn't say exactly.

Q. (By Mr. Howard): Did the chief engineer seem to understand the requirements for the proper operation of a Diesel engine?

Mr. Hokanson: I shall object to the form of the question as leading."

Mr. Hokanson: That I objected to as leading, and the further objection which I will lodge at this time, as being too broad and vague, since what the requirements are for proper operation of Diesel engines has not been established.

(Deposition of E. W. Pike.)

The Court: I believe the objection should be overruled. It is so ordered. [1001]

"A. As I say, he performed his duties around the engine for me very satisfactorily.

Q. (By Mr. Howard): Did you attend aboard the vessel during the sea trial?

A. Yes, sir, I did.

Q. For approximately how long was the sea trial?

A. For approximately two hours in the open sea.

Q. And at what speed were the engines run at that time? A. 320 revolutions.

Q. Would that be full speed? A. Yes.

Q. And in addition to the two hours in open sea at full speed, were the engines also operated through maneuvers in the harbor? A. Yes.

Q. What was the total time altogether that the engines of the Urania were operated during the sea trial? A. Six hours.

Q. State your recollection as to the manner in which the engines of the Urania functioned on that occasion? A. Very satisfactorily.

Q. As the result of your attendance on the dock trial, and sea trial, did you have occasion to recommend any further repairs or adjustments in the main engine?

A. No, sir; I recommended that they open up

(Deposition of E. W. Pike.)

the]1002] inspection plates for examination of the gears.

Q. And was that done? A. Yes.

Q. What gears were examined then?

A. The timing gears.

Q. And what condition was found there at that time?

A. Fine—no sign of any wear or tear, or anything of the sort.

Q. Did you check the terminals in the cylinders?

A. Yes, I went right over the whole thing.

Q. And what was the condition of the terminals?

A. Fine.

Q. Did you check the lubricating oil then to determine whether there was any contamination?

A. No, sir; we saw it—but you mean to check—We can take up a handful of oil and feel it and look at it, and look for bubbles and froth, and we can test it for water.

Q. Was there any evidence of bubbles or froth or contamination? A. No, sir.

Q. During the various trips that you made to inspect the Tanker Urania, did you observe other repairs or work being performed for the vessel?

A. Not that I was concerned with. They didn't call me for anything else. [1003]

Q. Did you observe anything else; any other work being performed?

A. There were some cleaners around there doing something.

(Deposition of E. W. Pike.)

Q. But you were not concerned with the other general work? A. No, sir.

Q. Were you present at the Craig Shipbuilding Company's yard when the Tanker Urania arrived on November 11, 1948? A. Yes.

Q. Did it arrive under its own power?

A. No, sir, it did not.

Q. How was it brought in?

A. Well, there was a salvage boat alongside of it, but she was just swinging into the dock.

Q. And upon your inspection of the engine on the first occasion on November 11, will you state whether or not the main engine was in operating condition at the time? A. No, sir, it wasn't.

Q. Why?

A. On account of the gears being destroyed—the timing gears being destroyed.

Q. From the conditions which you found to exist aboard the Tanker Urania and more particularly in the main engine, and the coolers that were examined on November 11, will you state, please, your opinion as to the nature of the breakdown [1004] of the main engine?

A. My opinion is the condition of the timing gears would do a great deal more damage if they continued to run it. There was no evidence that the engine wouldn't run when I saw it.

Q. The timing gears being in the condition that they were in, do I understand you to say that more

(Deposition of E. W. Pike.)

damage would have been sustained if they had been run?

A. I believe so.

Q. Now, having in mind again——

A. Just excuse me a moment, but the service man come up from tow with her, and he told me they stopped it to save them. They might possibly have started it up or maybe run it, if they had wanted to—I don't remember, however.

Q. Mr. Pike, having in mind again the condition you have described that existed aboard the vessel in regard to the main engine and the lubricating oil and coolers on the occasion of your inspection of the vessel on November 11, 1948, will you please state your opinion as to the cause of the breakdown?

A. We don't do that; that is not our job to state the cause. Our job is to examine the damage and to recommend the repairs, and see that the vessel has the proper trials to enable it to continue on its way.

Q. Then you don't care to express an opinion as to [1005] the cause of the breakdown?

A. No, sir.

Q. After completion of the dock and the sea trials and the repairs, did you make a recommendation, Mr. Pike, as to the then condition of the main engine aboard the Tanker Urania?

A. At the closing of my report, do you mean? Upon completion of the repairs, the above recommendations for repairs, and upon completion of the dock and the sea trials—when the results of those were determined and appeared to be satisfactory,

(Deposition of E. W. Pike.)

then it was recommended that the vessel be returned—

Q. So that insofar as its representation or classification by you—that is, the American Bureau of Shipping—was concerned, the main engine had been repaired satisfactorily so that the vessel could proceed to sea? A. Yes, in her trade.

Q. Thereafter, Mr. Pike, did you present to the owners a statement for the services you had rendered aboard the Tanker Urania?

A. Yes, sir.

Q. What was the amount of those services?

A. $163.00.

Q. And how was that charge computed?

A. I haven't got my book with me, but it was the [1006] approximate cost of the repairs plus the late service plus the expense.

Q. You state the approximate cost of the repairs; do they enter into the amount of your fee?

A. Yes.

Q. In what way?

A. They have a scale or a rule that determines the amount of visits—the number of visits made, and the cost of the repairs, in case of damages only.

Q. And so your service is determined according to a scale set up in the rule book of the American Bureau of Shipping? A. Yes, that is right.

Q. And are the fees which you charged for your services rendered to the Tanker Urania calculated on that basis? A. Yes, sir.

Q. And is the amount charged comparable with

(Deposition of E. W. Pike.)

what would have been charged for similar services to any other vessel of a similar type? A. Yes.

Q. I hand you what has been marked heretofore for identification as Exhtibit T-1 (handing document to the witness). Does that represent the charge that was made for your services? A. Yes, sir.

Q. And has that amount been paid?

A. I don't know. Some checks come right to our office and some go to the New York office.

Q. Well, in this case, to whom did you submit your report or survey?

A. Well, our New York office and the agent here.

A. And who was the local agent, again, please?

A. The General Steamship Corporation.

Q. And did you arrange to have any sample of lubricating oil aboard the Tanker Urania analyzed by a laboratory analysis? A. No, sir.

Mr. Howard: You may cross-examine."

Mr. Howard: At this time I will offer Identification A-21, Mr. Pike's survey report.

Mr. Hokanson: I object to the admission of the report to the extent that it contains comments based upon information not personally discovered by the witness.

The Court: May that be true of any survey report of this nature?

Mr. Hokanson: It may be true, Your Honor.

The Court: I suppose that when they first com-

(Deposition of E. W. Pike.)

menced [1008] making the law relating to the admissibility of marine surveyors' reports, one of the objections was that it contained information which was hearsay. Now, the question is raised anew on this objection, what is the law relating to admitting these survey reports with respect to all their contents which pertain to the job done?

Do you wish to set at large the question of the admissibility of such a document, or do you just want to limit the scope of your objection?

Mr. Hokanson: My objection would go to the admission of any part of the document which is not based upon the personal knowledge of the surveyor. In this case, it has been established by the witness' testimony that some of his observations were based upon information he received from third parties, with respect to the leaks in the cooler, for instance.

The Court: Do you mean as to the cause of the leaks?

Mr. Hokanson: As to the cause and as to the actual leaks that he reports as having existed. He has already testified concerning that, of course, in which he states that he received the information from some other person.

With respect to his own findings, I do not see that the report is objectionable. The question is whether the document may go in for a limited purpose, or whether certain portions of it may be stricken, or whether it should go in in its entirety.

Mr. Howard: If the Court please, we have al-

(Deposition of E. W. Pike.)

ready had the testimony of two witnesses who observed the leaks themselves, and as to the objections counsel raised, it seems to me they go to the weight of the document rather than to the admissibility of the document; and that since the witness has already testified to date in this deposition as to what he observed personally and has testified as to certain things that were reported to him by third parties, it seems to me that the document should be admitted in evidence for what benefit it has as to those he has personal knowledge of, and tied in with what we have testimony of other witnesses on as to the leaks and the lubricating oil.

The Court: I do not agree with counsel offering it that the objection in its nature goes to weight rather than admissibility. I think it goes to admissibility, and if you want to give me some authority on whether or not surveyors' reports are admissible only with respect to the direct evidence that they contain, I will consider it and any other authority you wish to offer. [1010]

Mr. Hokanson: May I suggest that there were additional reports that will be offered, and that if Your Honor cares to reserve his ruling until we are able to furnish authorities on that——

The Court: I will do it for a reasonable time. I may have to run the risk of ruling without the benefit of your authorities, I do not know, but I will wait as long as I can so far as the necessities of the trial are concerned. I will be glad to do that.

(Deposition of E. W. Pike.)

That is the kind of position in which the trial judge is frequently placed, as to which there is no similar position in which an Appellate Court is ever placed. An Appellate Court always has the benefit of either citation of authorities or an opportunity to themselves go into the library, take down the books, and look up the law. The trial judge cannot do that, or usually cannot. If counsel are not able to cite the authority, the trial judge either has to know it or has to let pass an opportunity that might otherwise be presented to disclose the authorities.

Mr. Howard: If the Court please, under those circumstances, I will reserve my offer.

The Court: I think the Court will act upon such a reservation.

Mr. Howard: Page 102, cross-examination.

"Cross-Examination

By Mr. Hokanson:

Q. Mr. Pike, how long have you been a surveyor for the American Bureau of Shipping?

A. Eight years.

Q. And are you a licensed marine engineer?

A. No, sir.

Q. How long have you acted as a surveyor?

A. I have been inspector and surveyor for ten years.

Q. Did I understand you to say, Mr. Pike, that

(Deposition of E. W. Pike.)

the sea trial was two hours that was conducted?

A. I didn't go to the log books, but I would say the sea trial was approximately two hours at sea—that is, after we left the breakwater, but sometimes they start them before they go through the breakwater and carry on until they get back to anchorage. In this particular case there was no set amount of time required. It was just a sea trial.

Q. Your estimate was, as I recall it, that the engines were run about six hours during the entire period of the trial.

A. Yes, as I recall, we went up to the oil dock to take on some bunker. As I say, there was no reason to make a record of the time.

Q. You boarded the Urania immediately upon her arrival at Long Beach, didn't you? [1012]

A. In the repair yard, yes, sir. I was there when she was swinging in.

Q. And when you went aboard, were the plates open at the time or did you cause them to be opened?

A. I believe they were open. There were workmen aboard who had been aboard I don't know how long, and I believe they were open.

Q. And the timing gears were still intact, were they?

A. The timing gears were still intact, yes.

Q. And were they removed in your presence?

A. Yes, they were removed in my presence.

(Deposition of E. W. Pike.)

Q. There are two lower timing gears on the Urania? A. Yes.

Q. Are they of the helical type?

A. Yes.

Q. Would you explain, please, what you mean by the helical type?

A. Well, they are just on a bias to run one gear into the other. We call them a train of gears.

Q. Are there also two helical gears at the top of the vertical shaft? A. Yes.

Q. If you remember, what is the diameter of the lower gears that were removed from the tanker Urania? A. Approximately 12 inches. [1013]

Q. Both of the same diameter?

A. No; one is a little smaller, if I remember right.

Q. And what would be the approximate diameter of the upper timing gears?

A. Approximately 10 inches.

Q. And the same number of teeth in both upper and lower gears? A. I am not sure.

Q. Do you know of what material the gears were made? A. Steel.

Q. And what would be the approximate depth of the teeth?

Mr. Howard: At what time, counsel? Are you speaking of gears as they were examined?

Mr. Hokanson: I have referred to the gears as he found them.

A. Oh, half an inch.

(Deposition of E. W. Pike.)

Q. And what is the approximate thickness of the teeth, if they were uniformly fixed?

A. Oh, probably half an inch at the base.

Q. And how much at the top?

A. Three-eighths.

Q. Three-eighths of an inch? A. Yes.

Q. You have stated that the gears were badly chewed. Would you describe what you mean by chewed? [1014]

A. Well, just heavily worn.

Q. Where was that wear apparent on the gears?

A. On the sides.

Q. On the sides of the teeth, do you mean?

A. On the sides of the teeth, yes. Some were up on the upper edge and some were on the lower edge and some were pretty well in the middle. It wasn't the same everywhere; that is, the wear was not uniform.

Q. The wear was not uniform? A. No.

Q. Was there any wearing into the core of the gear?

A. Some. By core you mean the root of the tooth where they connect?

Q. Yes. A. Yes.

Q. There was some wearing there?

A. Yes, some.

Q. Now, you have also stated that that condition obtained in the upper gears as well as in the lower gears. A. Yes, that is right.

(Discussion off the record.)

(Deposition of E. W. Pike.)

Q. Did you make the examination of the gears only while they were on the engine?

A. No, sir.

Q. When else did you examine them? [1015]

A. When they were out on the floor plates.

Q. And do you recall from the examination of the gears when they were on the floor plates whether there was any difference in the amount of wear as between the upper and the lower gears?

A. Not enough to state, except that they were badly worn—all four gears—and I rolled them and felt of them and saw their condition, but I didn't take any special note, because we have things like that happen every day, but to make an examination of that, why, it would have been a different case altogether.

Q. Mr. Pike, do you know what was done with the gears that were damaged and removed from the Tanker Urania?

A. No, I do not. I believe there was talk of taking them away; I don't know if they were left on board or not.

Q. What is the thickness, approximately, of those gears? A. Four inches.

Q. Is it possible, Mr. Pike,—if you know—to determine upon an examination of worn helical type gears whether the worn or galled condition was brought about from excessive pressure on the gears?

A. It could be; that is why I checked the line shaft—vertical shaft—for true, and also went

(Deposition of E. W. Pike.)

through the bearings and camshaft to make sure there was no distortion there.

Q. Well, from the manner in which these gears appeared [1016] to be worn, did you have any opinion as to why they were badly chewed and worn?

A. None to state; because there can be various reasons. In my own opinion, I was satisfied by finding that wasn't out of alignment.

Q. You mean that from the investigation you made you found no misalignment in terms of straightness of the vertical shaft?

A. Yes—and out of alignment for bearings—In other words, the cap being pulled down too hard or not in position—which is a strain.

Q. Now, Mr. Pike, the character of the galling of these gears was such as to lead you to suspect that there might have been an overloading of the gears, one reason for the dragging or misalignment of the gears?

A. That is one of the things I started to search for, yes. There was also what we call a foreign matter in the pit, which is determined from the average contaminated oil. You understand, there was only oil in the sumps and not in the pit when I was around. There was only oil in the sumps of the pit.

Q. You mean that——

A. The engine is built similar to an automobile engine, with a low point—a sump they call it—

(Deposition of E. W. Pike.)

where the oil returns and the pump picks it up and takes it on. [1017]

Q. And the oil had been removed except for that remaining in the pit?

A. Various low spots, yes. The ballast condition of the vessel could have had a little list aft and made various low spots.

Q. And so, from the residue in the low spots, you examined what oil was there? A. Yes.

Q. And your examination of that oil consisted of tasting it? A. Yes.

Q. And is that an accurate test to determine foreign matter?

A. No, it isn't accurate. We sucked a pumpful of oil out and discharged it into a bucket, a clean bucket, and there was water in it, and I pulled up some and tasted it and it tasted salty.

Q. You mean there was already water in the bucket?

A. No; it was a clean bucket, and we put this oil that we hauled out of the pump in it and looked at it there.

Q. Now, if there were salt water, let's assume, in the oil, it would go to the bottom of the pit, would it not—so that the oil scooped up in the pit——

A. Well, we fixed the pump to the bottom of the pit to hold it off of the botttom—that is, it is just regular [1018] marine practice.

Q. Do you know what the capacity of lubricating

(Deposition of E. W. Pike.)

oil was on that ship?

A. No, I don't. I saw the gravity tank, but I don't know what the capacity was. I mean, I have it all in the record, but we have no reason to remember that.

Q. You don't even know the approximate capacity of it? A. No, I don't.

Q. Would you say that the oil taken from the bottom of the pit would always be the consistency of the oil when the pump is full?

A. Oh, no, that is not its regular pump. You see, there is this low spot——

Q. Well, now, just to be sure that I understand you, you have stated, I believe, that salt water would go to the bottom, if there were salt water in the oil?

A. I would say water would go to the bottom.

Q. Or any liquid or fluid that was heavier than oil would go to the bottom? A. Yes.

Q. And therefore, isn't it true that if you scoop it up from the bottom you don't necessarily have a true sample of all the oil when it is circulating throughout the engine?

A. No, sir—the water should not be there—what I call salt water. [1019]

Q. Wouldn't it get a certain amount of contamination that goes into the oil? A. Oh, yes.

Q. But my question is that the oil taken from the very bottom—if there were foreign matter in it would contain a greater percentage of that foreign

(Deposition of E. W. Pike.)

matter than the rest of the oil? A. Yes.

Q. Now, then, do you know——

A. I mean, I don't know, that is, I didn't see the oil that came out of it. It was dumped overboard, I believe, before she arrived. I don't know, however. I suppose—I judge ordinarily they would get freed of that oil to make repairs.

As I say, the chief engineer was the center of lots of questions, and I didn't bother to ask him.

Q. Was there any mechanism or any way of separating oil from the water on this engine?

A. They didn't use that in the case of a lot of them—they have a separator, but if there was an awful lot of water, they would just throw it away.

Q. But your filters would take foreign matter out?

A. They would take it all out, if you wanted it, yes.

Q. If they removed the filters, those filters would show whether you had foreign matter or not?

A. That is right.

Q. Now, in your inspection of the engine you found no wear on any of the main or crank bearings?

A. None out of the ordinary. It just showed contact everywhere.

Q. What, if you remember, is the method on this engine of establishing the position of the vertical shaft here?

A. She has a thrust bearing on the bottom.

(Deposition of E. W. Pike.)

Q. Does she have a thrust bearing on the top?

A. A thrust bearing——

Q. And is that of the ball bearing type—a ball of metal?

A. I can't remember, but I am quite sure there was a ball.

Q. Did you inspect those thrust bearings?

A. Yes.

Q. And what was the condition of those?

A. Fine.

Q. Was there any reason to replace them?

A. No. And I am not sure whether they did or not. They were in pretty good condition.

Q. Is there any end play in the vertical shaft?

A. End play?

Q. Yes. A. Yes, she has an end play.

Q. Is that adjustable? [1021] A. Yes, sir.

Q. And by what method?

A. I don't remember the adjustment arrangement right now.

Q. Well, if—that is, would it be possible for a maladjustment to cause the gears to be out of alignment? A. Could be.

Q. Do you know whether it is necessary to readjust that adjustment mechanism if the gears are replaced or a governor is dismantled?

A. Let's see if I can get your question in my mind.

Mr. Hokanson: Read the question again, please, Mr. Reporter.

(Deposition of E. W. Pike.)

(The pending question was read by the reporter.)

A. The manufacturer's tolerances—they try to bring it all back to the manufacturer's tolerances.

Q. Is that your complete answer to the question?

A. That is the best I know how to answer it, because, according to the age of the engine or the condition of the engine, if it is new it may have a design adjustment.

Q. Assuming it is necessary to install the timing gears, would an adjustment be indicated there?

A. No, only to service it—because you follow their design tolerances, and a new gear would be the same as the old gear when it was new. It is supposed to be the same gear. The new gear is supposed to be the same as the old gear when [1022] it was new. That is the only way I know how to answer that question.

Q. Have you ever seen on this Diesel type engine gears that were not properly adjusted in accordance with the tolerances you have described?

A. Yes, we handle every kind of engine that is made; steam, electric, and everything; so to point to one manufacturer's design—you just can't do it without some of the prints to follow.

Q. Now, would it in your opinion—would a condition which overloaded the camshaft put extra pressure or weight on those gears?

A. We call that hugging.

Q. Well, assuming that in this type of engine,

(Deposition of E. W. Pike.)

upon the retiming of the engine, a condition developed where the valves were hitting the pistons, could that cause a thrustback on the timing gears?

Q. Where the valve is striking the piston?

A. That is right.

Q. It should be all out of line then; I don't know just how that question is meant.

Mr. Howard: Do you understand the question, Mr. Pike?

The Witness: Not quite.

Q. (By Mr. Hokanson): Assuming the changes on this type of Diesel engine did create a condition whereby the flange [1023] did strike the pistons, and such a condition actually occurs, in your opinion could this cause undue stress on the timing gears?

A. It could cause it. We are not the experts of the designing construction. The engine, we will say, comes to me in classed condition. All those things have been taken care of in other fields.

Q. Would you say that the load on that shaft, the vertical shaft on the Tanker Urania, was relatively constant through two revolutions?

A. Two revolutions of the main shaft?

Q. Yes. A. I would say yes.

Q. And, that being true, how would you account for the uneven wear of the gears?

A. Well, the only account I can give, of course,—wherever the damage started, the main damage that occurred would cause the gears to misbehave in every manner. It could have started in the middle

(Deposition of E. W. Pike.)

and by the time it wore the center section it started considerable trouble with the top or the bottom.

In other words, once the damage is started, everything will happen.

Q. In other words, if you had a temporary condition of undue stress on those gears which caused the wearing on [1024] them, that would tend to make them erratic to the extent that additional wearing would be brought about to the effect that the whole thing would be aggravated, and you would have an uneven gear?

A. If the gears were so you could watch them and you saw the damage start, then you could get a better answer to the whole thing. The way I understand it, everything was going along fine, but she just kept getting lazier and lazier, as they say, and finally they shut her down. Whether she stopped herself or not, I don't know. She could, however.

Q. Do you know whether the wear was eccentric with reference to the center of the gears?

A. Not too much so. As I say, it was every way, and it had the service man puzzled as to how some parts of the gears were destroyed. I mean it would just disappear and then over here it would take up again.

Q. Would the teeth on one side of the gear be in better shape than on the other side?

A. Not too much so. In certain cases and in spots it would be. In some spots the entire tooth would be satisfactory, and then you would go along

(Deposition of E. W. Pike.)

and we would see three more teeth that would start to show wear, and the fourth tooth from that one would be excessive, which would make you wonder why it didn't happen on the one before that.

Q. Mr. Pike, you have examined lots of gears—[1025] damaged gears, in vessels in your experience, haven't you? A. Yes, sir.

Q. Would you say that the kind of wearing that you found in these gears, as you have explained it in your testimony, would be characteristic of poor lubrication?

A. It could, along with foreign matter or overheating. I mean there was no one opinion that I could give. I would not state my own opinion of the thing, because that would not be fair.

Q. In other words, there could be a variety of causes for that condition? A. Yes.

Q. Have you ever seen gears of this type which were damaged because of contaminated lubrication?

A. Yes.

Q. In those occasions did you find damage to other bearings?

A. In certain cases, yes, where it had got away from them—had gone too far before the engine was stopped—I have seen considerable damage.

Q. Well, do you know from your experience what usually happens first in this type of damage where we will assume that the damage is caused in part by improper lubrication—whether the tightness of the bearing or overloading—whatever character

(Deposition of E. W. Pike.)

it might be—occurred before the wearing of [1026] the gears, or if the wearing of the gears occurred first?

A. Well, it just gets hot with no lubrication and starts what we call spalling or galling or pitting—that starts. Is that what you mean?

Q. Well, I am not sure you understood my question.

Do you know from your experience in these matters with damage of this type, which occurs first, the overheating or overload, or the actual wearing of the gears?

Mr. Howard: Now, do you understand that question?

The Witness: I believe so. I will try to answer it.

A. First, there was the poor lubrication you wanted—if it was contaminated. Which did you want first?

If it overheats first and starts to wear, it then starts to go on out.

Q. You are speaking now of overheating in the gear——

A. Due to retaining contaminated lubrication or due to foreign matter.

Q. But if you once get an erratic condition in those gears, you have set up a chain——

A. ——in which everything can happen.

Q. It is endless; is that it? A. Yes.

Q. Are you acquainted, Mr. Pike, with the analysis test of lubricating oil and the various factors

(Deposition of E. W. Pike.)

which are used in making an analysis of the oil?

Mr. Howard: I waive my objection.

"A. I am not fully aware, but for my own information at times—time and again I have watched and I understand from the service man——

Mr. Hokanson: No; just a minute.

Mr. Howard: Is that part of your answer to the last question?

The Witness: No.

(Discussion by counsel off the record.)

Q. (By Mr. Hokanson): In cases of damage to timing gears, as you observed them, have you ever seen a damage to gears of that type where the lubrication is proper but you had an overload on your camshaft? A. Yes, sir.

Q. Or where you might have a deflection in your crankshaft; is that possible? A. Yes.

Q. In other words, these gears are of such a character that they require almost perfect alignment in order to continue to function without substantial wear? A. Yes, sir.

Q. Well, Mr. Pike, if the gears of this type are in perfect alignment and they have adequate lubrication, how [1028] long would you say the gears could run if they were in perfect alignment?

A. Well, we call for examination in four years.

Mr. Howard: Every four years, do you mean?

(Deposition of E. W. Pike.)

A. Yes, every four years. It would be according to the trade of the vessel.

Q. (By Mr. Hokanson): Now, assuming you have perfect alignment in these gears and you have lubrication of some type—always assuming that it is contaminated lubricating oil—and the gears are made of steel, do you know from your own experience that will continue to function properly under this condition?

A. No, it would be impossible to know. It could bear up on a test run or a test trial. Does that answer the question?

Q. As you say, nobody knows—and you can't give an answer in terms of how many hours?

A. No, I mean, if you buy contaminated oil, it would probably—well, you couldn't say how long it would last; maybe two months and maybe ten hours.

Q. Have you ever heard of running any gears with water lubrication alone?

A. I don't think I have. I don't see why it couldn't be, however. I know that under certain circumstances it wouldn't hurt them—if they were not abused or if they were not raced. [1029]

Q. Well, if you could use water alone——

A. Well, I am just answering from my experience; what it could do if care was taken.

Q. You said in your direct testimony that even though you had leaks in the coolers you could develop contamination of the oil in two hours.

(Deposition of E. W. Pike.)

Mr. Howard: I don't recall that he made that statement.

The Witness: I don't either.

Q. (By Mr. Hokanson): Well, referring back to what you said with reference to the dock trial, you, I believe stated that you didn't examine the coolers after the dock trial; is that right?

A. Yes.

Q. And I believe you said in that connection they could develop the contamination of oil in that period of time. A. I don't remember that.

Mr. Howard: I don't believe that was his testimony.

Q. (By Mr. Hokanson): Well, I beg your pardon if I am mistaken. My notes so indicated, however.

The Witness: No, I don't remember that.

Q. Now, when you first looked at the lubricating oil cooler, was it attached or was it dismantled?

Mr. Howard: I shall object to that as repetitious.

(Discussion by counsel off the record.)

The Witness: It was still in the vessel and attached [1030] to the engine, but the inspection plate was on.

Q. (By Mr. Hokanson): You say that the inspection plate was on when you first saw it?

A. Yes.

Q. You have reference to the lubricating oil cooler? A. Yes.

Q. Well, is there more than one cooler?

(Deposition of E. W. Pike.)

A. Yes; the auxiliary cooler.

Q. Are there any of the heat exchangers or coolers on the main engine?

Mr. Howard: If you recall.

The Witness: I was just trying to remember my position on the vessel at the time—I don't just remember."

Mr. Howard: I submit that next question, since the exhibit is not in evidence, is inappropriate at this time. Counsel has objected to the admission of that exhibit.

Mr. Hokanson: May it please the Court, since the Court has determined to reserve its ruling on the admissibility of the survey report, I should think that it would be proper, the cross-examination with reference to the report, subject to that testimony.

The Court: Is there any objection? [1031]

Mr. Howard: No, your Honor.

The Court: You may do that, upon that condition.

"Q. (By Mr. Hokanson): Well, referring to Cross-Libelant's Exhibit X-1, which is your survey report, item No. 3—you state that there are thirteen leaks, and you say further two fresh water coolers and one lubricating oil cooler—there were two fresh

(Deposition of E. W. Pike.)

water coolers and one lubricating oil cooler on board? A. Yes.

* * *

"Q. (By Mr. Hokanson): Now, there was a plate for observation of the lubricating oil cooler, and you looked inside the cooler at the time, did you?

A. Yes.

Q. And that was on the salt water side?

A. That was on the salt water side, yes.

Q. You say that there was a certain amount of dirt?

A. Yes. Well, it wasn't perfectly clean, in other words.

Q. But it wasn't excessively dirty? [1032]

A. No.

Q. It was not clogged up? A. No.

Q. And was the dirt in the cooler, from your observation, of an amount that you would encounter in the period of a voyage of 2400 miles?

A. Well, I have never examined one on that basis, but approximately.

Q. Could you tell from looking into the cooler whether there were leaks in it?

A. Not looking into it, no.

Q. Did you look into the lubricating oil side?

A. No, that was when it went to the service company.

(Deposition of E. W. Pike.)

Q. So that you do not know whether the lubricating oil side was clogged in any way? A. No.

Q. The amount of dirt that you found in the salt water side of the lubricating oil cooler was not sufficient to give alarm? A. No, sir.

Q. Do you know how many leaks there were in the lubricating oil cooler alone? [1033]

* * *

"A. I don't know. I don't remember.

Q. (By Mr. Hokanson): But your report states that there was a total of 13 leaks in the two fresh water coolers and one lubricating oil cooler.

Mr. Howard: The same objection."

Mr. Howard: That is objected to as repetitious.

The Court: The objection is overruled.

"A. They reported it to me.

Q. (By Mr. Hokanson): Now, this may be repetitious, but I want to be sure that I understand your testimony——just what your testimony was on direct examination. You stated that the leaks as they were found occurred in the sheets——

A. We call it the tube sheets.

Q. Is that where the tubes are soldered or sweated in one way or another with——

A. That is what I call the tube sheet, where they are fastened together with the manufacturer's

(Deposition of E. W. Pike.)

make of solder——I will call it solder——and that is all I know.

Q. Now, do you know what the normal operating pressure on the salt water side is?" [1034]

A. I don't remember.

Q. (By Mr. Hokanson): Assuming that the operating pressure on the salt water side of this type of cooler is 7 pounds, and assuming further that a cooler auxiliary pump was used for delivering pressure of 100 pounds, and that pump was operated over a period of time, should that, in your opinion, cause leaks in the lubricating oil cooler?"

Mr. Howard: I object to that question as containing assumptions which are not yet a matter of evidence in this case, in the record of this case.

Mr. Hokanson: The deposition of Mr. Cross establishes that an auxiliary pump was used. The number of pounds pressure that pump would deliver may not yet have been established, but, Your Honor, I submit that there will be testimony and there is testimony in the way of depositions which will establish that fact. By reason of the order of proof I feel that it is proper to include an assumption which counsel advises the Court will be later established by the evidence.

The Court: I do, too. If you promise it will be, the Court will overrule the objection. If the

(Deposition of E. W. Pike.)

promise [1035] is not fulfilled, if counsel will call it to my attention later the Court will make an appropriate ruling.

"A. Well, without examining it closely, that is hard to determine, that is, hard to answer that.

Q. If the lubricating oil cooler became excessively heated, what provision is there in the cooler to allow for the shrinkage of the tubing?

A. The expansion and contraction——that is the way it is built——I don't know all of the coolers. It is an accepted lubricating oil cooler. That is all I can go by. The make, the manufacture, the design, and all of that is accepted.

Q. Do you know what type of coolers these were? A. I don't remember.

Q. So you wouldn't know what the performance reputation of that type of cooler is?

A. No. I even remember seeing the name plate, but I don't remember what it was now.

Q. Would it be possible in your experience, or in your business, that you could testify to this as an expert——

A. We are not considered the expert. That is our New York office——

Q. In assembling the cooler on the engine——when it [1036] is connected up and the flanges are bolted down, in bolting it down do you think it possible that that could be done in such a way as to cause leaks in the joints?

(Deposition of E. W. Pike.)

A. I don't know of any particular reason offhand.

Q. And if there was an excessive vibration of the engine?

A. Oh, you could drop it, or excessive vibration, or a hanger not in position or left out.

Q. So those factors might cause leaks?

A. There are lots of possible causes——lots of causes, yes.

Q. Now, you stated that you found some water leaking through the lubricating oil terminal of No. 2 cylinder.

A. That was shown to me, and the gasket was thrown over to me and I threw it away and said to put a new gasket in.

Q. Did you see the gasket removed from the liner?

A. Well, I was right beside it——I was watching it.

Q. And who gave it to you?

A. One of the service men.

Q. Was that gasket on the water jacket side of the lines?

* * *

The Witness: The best way I can state it is that it is between the water jacket side and the cylinder. It is a [1037] gasket that is not supposed to allow water to enter into the cylinder.

Q. (By Mr. Hokanson): Now, this lubricating

(Deposition of E. W. Pike.)

oil leads into the lubricating surface of the cylinder on a thread fit; where are they?

* * *

A. Well, that is a term of our own. It is a threaded unit. It is a terminal that fits in there.

Q. (By Mr. Hokanson): And this gasket was placed on the water jacket side of the liner at the point where the terminal enters the liner; is that correct?

A. Where the terminal enters the liner, yes.

Q. Did you examine the other cylinders to determine whether there were other gaskets leaking?

A. No, sir.

Q. How much water did you find on the inside of the liner?

A. Oh, just in dribbles——probably several tablespoonfuls.

* * *

Q. (By Mr. Hokanson): The water entering the cylinder [1038] chamber through a leak at that point——does it have any effect on the combustion in your engine?

A. Well, it is according to how bad it is. It hadn't ought to.

Mr. Howard: As I understand your answer, it depends on how much water there is?

The Witness: That is right. I didn't see any test for that leak. I just saw a leakage of the

(Deposition of E. W. Pike.)

water and felt of it. I didn't taste it. In other words, that would have been an ordinary voyage repair. That wouldn't be considered anything at all on an ordinary voyage repair, but tying into this, it makes it sound different——but that is what was done at the time.

Q. Could you develop the leaky gasket at that point through vibration?

A. Oh, yes, you could.

Q. Could it occur on a normal sea voyage?

A. It comes within the human element——you put it in and it may be crinkled up when putting it in, but if it is installed properly, I think it would last as long as the rest of the terminal gaskets.

Q. In other words, it is impossible to predict in a case of this kind what might bring about the leak——whether it was a condition that came about naturally over a period of time from vibration, or whether it was defectively [1039] installed at the time? A. Yes.

Q. Mr. Pike, have you ever surveyed any other Union Diesel engines of this type?

A. I have, but as to the type, I mean——that is, whether large or small, or other phases of it, but I have examined them over the years——

Q. Did you ever run into this type of condition before?

A. No; it was a different survey altogether.

Q. You say it was a different survey altogether?

A. Yes.

(Deposition of E. W. Pike.)

Q. You have reference to one particular case?

A. No, several cases——leaky liners or something of another nature altogether. All engines have to go through a four-year period, and I haven't had one on a four-year period.

Q. Now, you went aboard the ship from time to time between November 11th and November 16th, 1948, did you? A. Yes.

Q. You didn't observe all of the work that was done on the engines effecting the repairs, did you?

A. In what way? Do you mean other work on the engine?

Q. Yes.

A. Oh, there was nothing particular——nothing other than this repair that I recollect.

Q. In other words, everything else seemed in order to [1040] you?

A. Yes. They opened up the parts I wanted to see and closed them up, and the thrust valves and the cam bearings——which is on top and away inside on this engine——but I was looking for misalignment. That is what I started up there for.

Q. You didn't actually see the work that was done in making the repairs, did you?

A. Always, yes.

Q. In other words, then, you were present at all times when the——

A. No, I kept——that is, they opened this up under our recommendations and didn't close it until we were satisfied to close it. I don't stand over

(Deposition of E. W. Pike.)

the heads of the service men in their installations.

Q. In other words, you always have them opened for your inspection, but the work goes on in your absence, nevertheless?

A. Yes, that is right.

Mr. Hokanson: I believe that it all.

Redirect Examination

By Mr. Howard:

Q. You were satisfied from your examination initially aboard the Tanker Urania that you could eliminate the possibility of damage to the bearings by pressure? A. Yes.

Q. Or misalignment? [1041]

A. Yes. This engine, as I understand it—— this engine was worked on in Mexico some place previous——the same work was done, and the service men are supposed to be the experts, and we were describing it as we took it apart.

Q. Mr. Pike, you stated, I believe, on cross-examination that you found some foreign matter in the sump of the pit when you opened it up. What was that foreign matter?

A. Nobody knows what it was. I mean it was just——

Q. Can you describe it?

A. A mulsified oil and water and a little bit of residue from the crank walls and the bearing surfaces, etc. It all makes just a little soft putty substance.

(Deposition of E. W. Pike.)

Q. And was that what you sampled by tasting?

A. No, sir; that was some water that was there.

Q. Now, the fluid that you sampled by tasting, you had no doubt after tasting it as to whether it was fresh or salt water?

Mr. Hokanson: I object to the question as repetitious."

Mr. Hokanson: This is redirect examination. It is his witness.

Mr. Howard: I was merely trying to touch upon a point that was brought out on cross-examination. I concede that the matter was developed on direct [1042] examination, but having gone into it in such detail on cross-examination, it seems to me it is appropriate to allow this question to be propounded on redirect.

Mr. Hokanson: I don't believe that question was developed on cross-examination.

The Court: I am going to sustain it, because it has been gone into rather fully before this.

"Q. (By Mr. Howard): Was there any doubt in your mind as to whether it was salt water?"

Mr. Hokanson: The same objection, Your Honor.

The Court: The objection is sustained. I am sure that both sides have asked about salt water.

(Deposition of E. W. Pike.)

"Q. Under normal conditions there couldn't be any appreciable amount of water in the sump?

A. No, sir.

Q. Assuming that the gasket from the terminal leading [1043] into No. 2 cylinder had been installed a short time previously and the engine had only been operated, say, for a period of about 500 hours, would you normally expect that gasket to be destroyed? Would you expect it to be in the condition in which you found it?"

Mr. Hokanson: That is objected to as having been covered completely on cross-examination and direct examination. It is repetitious.

The Court: Do you have in mind something special in the cross-examination that was not covered previously?

Mr. Hokanson: Yes, Your Honor. I asked him about the leak in the gasket, whether it was a normal type of thing. Referring back to page 127, I believe that matter is covered very fully. He has given his opinion on that; the question beginning on line 14, page 127, the answer at line 19.

Mr. Howard: I submit, if the Court please, that that is within the scope of proper redirect examination where I am taking up the same subject counsel went into on cross-examination.

(Deposition of E. W. Pike.)

The Court: There are two questions in one, and the answer is "No, sir". It is not easy to tell which one he means, unless he is referring to the last question. [1044]

Mr. Howard: The answer seems to be of no probative value, anyway.

The Court: The objection is sustained.

"Q. Those gaskets last a long time, don't they?

A. Normally——

Mr. Hokanson: I object to the question——

Q. (By Mr. Howard): Well, how long do the gaskets last?

Mr. Hokanson: If you know.

A. I don't know. Some operators have annual inspections and some have their four-year inspection and some don't touch them until they are forced to. We have five years too——that is one year of grace.

Q. (By Mr. Howard): Normally you would expect a gasket to last more than 500 hours, would you not? A. Oh, yes.

Q. You were not in constant attendance on the vessel, were you? A. No.

Q. But you attended as frequently as necessary?

A. As frequently as I considered necessary, yes.

Mr. Howard: That is all.

(Deposition of E. W. Pike.)

Recross-Examination

By Mr. Hokanson: [1045]

Q. Speaking of this gasket, Mr. Pike, was the liner removed?''

Mr. Howard: That is objected to as being repetitious.

Mr. Hokanson: There is no question about liners being removed. It may be objectionable with respect to the scope——

The Court: It is sustained; therefore, omit the answer.

Mr. Hokanson: May I make this observation at this point, Your Honor? This line of questioning appears to be an effort to find out from the witness the exact location of this gasket and how it was removed. It is merely informative more than anything else. I think Mr. Howard will agree.

Mr. Howard: That is true, counsel, but I have been waiving some of my objections as to repetition. I feel if you are going to insist upon objecting to my questioning, I will have to do the same.

Mr. Hokanson: I have no desire one way or the other, except insofar as this testimony might enlighten the Court as to the nature——

The Court: I think all of this has been gone into at such great length, it may be not with this witness as [1046] with others, but at great length.

Mr. Hokanson: I will waive the questions.

(Deposition of E. W. Pike.)

The Court: Does the objection go to the inquiries about the terminal?

Mr. Howard: Yes, your Honor.

The Court: That objection is sustained.

"Q. When did you make your inspection of the bearing of the camshaft?

Mr. Howard: That is objected to as not proper recross-examination."

The Court: Is there any response?

Mr. Hokanson: No response, your Honor.

The Court: It is sustained.

Mr. Howard: My objection would run to the remaining questions on recross-examination.

Mr. Hokanson: No response.

The Court: Sustained. [1047]

Mr. Howard: That concludes the deposition of Mr. Pike, which I offer in evidence.

The Court: It is received in evidence as a part of the case in chief of the cross-libelant.

Was there any voucher or exhibit relating to the cost of this witness' services?

Mr. Howard: Yes, Your Honor. That comes in a group of vouchers which will be identified in another deposition. We have received the testimony on it.

The Court: Proceed to the next deposition.

Mr. Howard: I would like to read the deposition of Mr. Dupuy, in the same cover, beginning at page 244.

(Deposition of E. W. Pike.)

If the Court please, we are prepared at any time convenient to other counsel and the Court to address the Court on the law relating to the admissibility of this survey report which has been offered; whenever you are ready, counsel.

The Court: You may proceed.

Mr. Hokanson: Does Your Honor have any disposition one way or the other with respect——

The Court: I do not wish to submit it until you are ready to. I prefer to give you an opportunity—I assume from what you have previously said you are not ready. If you are not, we will pass it for the time being. I will say to both sides, it seems to me the [1048] objection goes into the primary question of whether a surveyor's report under any circumstances is admissible over objection. It certainly involves that as one of the primary questions. If you insist that it is not, then that puts the whole subject at large.

Mr. Hokanson: We do not desire to make a further study of the authorities, Your Honor, with respect to this question. My objection as originally noted went to that part of the survey report which involves a statement, comment offered for the proof of the truth of the matter asserted not within the personal knowledge of the person making the report as shown by the testimony given.

The Court: Do you agree that a surveyor's report, as has apparently been agreed between counsel respecting other survey reports offered in evidence

(Deposition of E. W. Pike.)

in this case up to this time, is admissible, generally speaking?

Mr. Hokanson: Where it vouches for the surveyor's written or spoken testimony, I would see no objection to the admissibility of such a report.

The Court: I would be surprised if you would find any surveyor's report that is free from hearsay. Perhaps some are, but I would be very much surprised to find one that is.

Mr. Hokanson: The point that I make, Your Honor, [1049] is to the extent that the report contains hearsay, I feel that it is objectionable.

The Court: Have you any authority on it?

Mr. Hokanson: I have no authorities to submit.

The Court: Have you any authority to support the offer as to the hearsay contained?

Mr. Legros: (The Mason, CCA 2 (1918), 249 F. 718) Judge Hough, speaking for the Second Circuit, 1918, speaking for Justices Rogers and Learned Hand, says:

"In cases of stranding, damage is commonly received in places where no eye can see that which happens at the time of harm, and in the nature of things the best evidence as to what was injured, and often excellent and persuasive evidence as to how the injury occurred, is given and must be given by competent and experienced men who subsequently examine the hurt."

I submit that a surveyor would never know how the injury occurred unless it was given to him by

(Deposition of E. W. Pike.)

hearsay evidence. Later on, he says: "Such surveys are always evidence, though not conclusive."

The Court: The authority is not conclusive, either, because it does not meet head on the questions here. You should let the Court know how any question is raised in the authorities cited. From all that appears from what counsel has stated, the Court in making those [1050] comments may not have been compelled to make the statement or ruling by reason of any dispute arising in the case. I do not know how the question arose.

I think we are just wasting more time. The matter is passed until both sides are ready to proceed.

Mr. Howard: Page 244.

DEPOSITION OF GEORGE M. DUPUY

"Direct Examination

By Mr. Howard:

Q. Will you state your full name, please, and give your residence address?

A. My name is George M. Dupuy. I live at 1237 Lakme Avenue, Wilmington, California.

Q. What is your business or occupation?

A. I am a marine surveyor.

Q. Do you have any connection with Lloyd's underwriters or Lloyd's Agents?

A. Only on specific jobs.

Q. How long have you been in the business of marine surveyor and engineer?

(Deposition of George M. Dupuy.)

A. Four years.

Q. What was your occupation previous to that time?

A. Marine engineer — seafaring — on seagoing vessels.

Q. What type of vessels did you serve on? [1051]

A. Freighters and tankers and passenger ships; various types of ships.

Q. For how long were you engaged in that occupation?

A. I would say approximately 12 years.

Q. And during that period of time have you ever served on any vessels propelled by Diesel engines?

A. Only in outfitting, during the war.

(Discussion by counsel off the record.)

Q. Mr. Dupuy, do you care to waive the reading and signing of your deposition that is now being taken when it has been transcribed from the reporter's shorthand notes into typewritten form in preparation for the trial of this case?

A. Yes, I will waive the reading of it.

Q. Do you expect to be in Seattle, Washington, or in the State of Washington, on or about April 6, 1949 ?

A. No, I do not expect to be there at that time.

Q. Do you recall the occasion last November when the Tanker Urania called at the port of Long Beach, or Los Angeles?

A. That was in November?

(Deposition of George M. Dupuy.)

Q. Of 1948, yes.

A. That is correct, yes, I recall the occasion.

(Discussion by counsel off the record.)

Q. Did you go aboard the vessel at that time?

A. Yes.

Q. And for what purpose?

A. To make a survey at the request of the underwriters—the owners and the underwriters, regarding damage to the timing gear.

Q. And did you make such a survey?

A. Yes, I did.

Q. And was a report prepared on that survey?

A. Yes."

Mr. Howard: I will ask to have the clerk mark as the next identification number the survey of Mr. Dupuy, indicated as Claimant's and Cross-Libelant's Exhibit Z-1 to Z-8 in the Los Angeles deposition.

(Survey marked Respondent's Exhibit A-22 for Identification.)

"Q. Handing, you, Mr. Dupuy, what has been heretofore marked by the court reporter for identification as Claimant's and Cross-Libelants Exhibits Z-1 to Z-8, inclusive, will you examine that, please, and tell me what it is (handing documents to the witness)?

A. Yes, this is my survey report on that vessel.

(Deposition of George M. Dupuy.)
It concerns the damage to the engine of the Tanker Urania. [1053]

Q. And that was prepared from the findings that you made while you were aboard the Urania?

A. Yes.

Q. On how many occasions did you go aboard the Urania during her visit last November?

A. Well, I would have to make an approximation.

Q. Yes; just approximately.

A. Approximately three visits.

Q. I am handing you what has heretofore been marked for identification as Claimant's and Cross-Libelant's Exhibit T-39. Can you state what that is (handing document to the witness)?

A. That seems to be the bill for my services."

Mr. Howard: For the record, this last one is identified by the deposition number as referred to in another deposition and will be introduced later, Exhibit T-39.

The Court: Since beginning Mr. Dupuy's deposition, have you had marked another one previous to this?

Mr. Howard: No, Your Honor, that is the only one that has been marked in the Dupuy deposition.

"Q. And what is the amount of that, please?

A. The complete amount?

Q. Yes, the complete total.

(Deposition of George M. Dupuy.)

A. The total is $154.81.

Q. Now, what is the actual amount of the charge for your services? A. $105.

Q. Well, how is that fee determined—how do you compute it?

A. Well, you compute it several ways; sometimes by the cost of the damage or the expense, and the number of visits.

Q. Is that the normal charge that would be made in this area for services of the type rendered to the Tanker Urania?

A. Well, it is normal, yes; I suppose it would be normal, yes.

Q. Well, have you been paid for the work you performed? A. Yes.

Q. Now, you have a record of the first visit you made the first time you were aboard the Urania, have you?

A. I am sorry I don't have those notes.

Q. Would your report or survey show that?

A. No, not necessarily—well, yes, in the first visit, yes, the report of the survey would show that —November 11th and subsequently, yes.

Q. Now, will you state, please, what you found as to [1055] the condition of the main engine of the Tanker Urania when you first went aboard the vessel?

A. When I first went aboard the vessel, the engine was opened up.

(Deposition of George M. Dupuy.)

Q. You say it was then opened up—did you observe it being opened up?

A. No, when I first saw it, it was open.

Q. Very well. Now, will you continue?

A. And upon examination of the gears we found the two top and two bottom timing gears on the vertical shaft severely worn—as I state here in my report (indicating document).

Q. Would you say that the main propulsion engine of the vessel could have been operated in the condition in which you found the gears on the occasion of your inspection?

A. No, I would say it would have been inadvisable to operate it in that condition.

Q. Would you describe for us in a little more detail the worn condition of the gears that you have just referred to?

A. As I recall it now, the tooth faces of the gears were severely worn.

Q. Was that uniform on all of the gears or would it vary?

A. It would vary—yes, it would vary.

Q. Would it vary in a particular gear or would it vary as to several gears that you located in groups here—— Was it wearing even on one gear around the entire—— [1056]

A. That has been some time now, but, as I recall it, it was staggered more or less. At various places it was worn more seriously than in others.

Q. Now, I notice your report, on the first item

(Deposition of George M. Dupuy.)

mentioned, it records that the vertical shaft was placed in a lathe and checked for true. Do you know whether that was done, of your own personal knowledge? A. I witnessed the checking.

Q. And what did you find the condition of the shaft to be?

A. We didn't find any distortion of the shaft. The shaft appeared to be straight, on checking with the lathe.

Q. You set out under "Recommendations," "Engine's timing gears to be checked for true alignment."

Did you witness that checking?

A. Partially. It is quite a long drawn out procedure and I wasn't able to remain there for the entire checking but it was reported to me by—I spoke to Mr. Cross of the Union Diesel Company, who was in charge of the job.

Q. What did you yourself observe as to the alignment of the timing gear assembly?

A. It appeared to be in good alignment.

Q. You have also in your report recommended that the crankshaft deflection readings be taken, and thrust bearings examined. Did you participate in those checks and readings?

A. Well, I haven't that record—those readings, no. [1057]

Q. Do you know of your own knowledge, or was it brought to your notice, whether any deflection was found in the crankshaft?

(Deposition of George M. Dupuy.)

A. It was reported to be in good order.

Q. And you inspected the thrust bearing, did you, Mr. Dupuy?

A. Yes, I saw the thrust bearings also and they appeared to be all right.

Q. Now, your report mentions evidence of salt water in the lube oil system.

Will you please describe to us what evidence you found of this salt water?

A. Well, the only evidence I found was in some pockets of it, and you got the impression that it was contaminated or that there was contamination or emulsified condition of the oil as if it had been contaminated with water. I believe it was assumed that that was salt water.

Q. Did you sample is or taste it yourself?

A. No, I never did.

Q. Now, I note your report indicates that the lubricating oil cooler was found leaking between the salt water cooler and the lube oil side. How did you determine that?

A. It was tested—the lube oil cooler was tested and found to be leaking. [1058]

Q. Was it tested aboard the vessel?

A. Well, I wouldn't want to put that in as a definite statement, but I believe that it was.

Q. The recommendation as to the lube oil cooler is that it should be proven tight under 100 pounds hydraulic test. How did you determine the pressure

(Deposition of George M. Dupuy.)

that was to be used on the testing of the lube oil cooler?

A. I wasn't there at the testing of that. That was done up at the plant where it was overhauled.

Q. The lube oil cooler was removed from the engine room?

A. Yes, taken out of the engine room and taken up and overhauled and a repair made and then tested.

Q. And you recommended that, did you?

A. Yes.

Q. I note that under the column of recommendations you indicate that the lube oil system should be thoroughly cleaned and flushed to remove all steel particles and salt water.

Had you observed some steel particles or some salt water in the system?

A. No, but I considered it should be done. I just considered the condition of the timing gears, but I never considered anything particularly, however.

Q. You have recommended in your report that the timing gears—that new timing gears should be installed. Do you [1059] know whether or not that was done?

A. Yes, it was. They were installed.

Q. Do you know who performed that work?

A. The Union Diesel Engine Company of Oakland, California.

(Deposition of George M. Dupuy.)

Q. And were you present during the course of those replacements of the timing gears?

A. I made visits there.

Q. Were you aboard the vessel during the dock trials? A. No, I wasn't there then.

Q. Or during the sea trials? A. No.

Q. Did you examine the main engine of the Tanker Urania at the conclusion of the dock or the sea trials? A. No, I never did—personally.

Q. From the inspections and examinations that you made of the main engine aboard the Tanker Urania at Long Beach, California, in the month of November, 1948, will you state, please, your opinion as to the nature of the breakdown of the main engine?

A. Well, my opinion was that—on the cause of——

Q. No; I am first inquiring as to the nature of the breakdown; what was the nature of the breakdown?

A. Well, the timing gears, the upper and lower timing gears of the vertical shaft were worn to such an extent that [1060] it was impractical to operate the engine.

Q. That being your opinion as to the nature of the breakdown, will you now state for us, please, your opinion as a result of your experience and your examination of this main engine and the parts thereof—as to the cause of the breakdown?

A. Well, in my opinion from the observations I

(Deposition of George M. Dupuy.)

made of it—the cause of it was the contamination of the lube oil system through the leakage of the cooler.

Q. And is that also based upon the conditions that you actually found to exist aboard the Tanker Urania? A. Yes.

Q. Referring now, if you please, to Claimant's and Cross-Libelant's Exhibits Z-4 to Z-7, inclusive, for identification, did you obtain those extracts from the ship's log?

A. I got these extracts from the owner's representative. As I recall, they were written in Greek and they had to be translated, and I obtained the translation.

Q. You had another person translate it for you because you don't read Greek yourself?

A. That is right.

Q. And those translations of the ship's log were obtained from the owner's representative?

A. Yes. [1061]

Mr. Howard: You may cross-examine.

Cross-Examination

By Mr. Hokanson:

Q. Mr. Dupuy, you were hired at the request of both the owners and the underwriters?

A. That was the way it was always stated. The owners contact the underwriters and the underwriters contact us.

(Deposition of George M. Dupuy.)

Q. Who did you actually represent when you made this survey, then?

A. Well, our reports were sent to the underwriters; that is, Best & Company at that time.

Q. You first went aboard the vessel on the 11th of November, as your report shows? A. Yes.

Q. And the engine had already been opened up at the time, had it? A. Yes.

Q. Who was present when you first started your inspection?

A. Mr. Edwin Pike, I believe, and Mr. Harry J. Summers, and Mr. Cross from the Union Diesel Company, and the owner's—I didn't have his name—there was an owner's man there—he may have been the owner himself—I just don't recall now.

Q. Was any examination made of the camshaft by you?

A. Just a visual examination. They lifted the bearing [1062] on the camshaft and we examined it in place.

Q. You didn't turn it over?

A. No, I never witnessed that. It is kind of hazy in my mind—a lot of this. As I recall it, however, all of the camshaft valve levers, etc., were removed, and the camshaft formally examined.

Q. In your presence?

A. Yes—well, I was there and saw it disassembled.

Q. Do you remember how long after you first went aboard that that was done?

(Deposition of George M. Dupuy.)

A. Well, I would rather not answer that. I think it was within the last two days—on my subsequent visits I was there during that period.

Q. You are not sure whether the lubricating oil cooler was investigated aboard the ship or not?

A. I wouldn't say for sure, no, because I wasn't there to witness it.

Q. You didn't see it yourself? A. No.

Q. Well, as I understand it, you didn't actually make any test of the oil that was taken out of the pit or the base of the engine, but you reported that there was evidence of salt water in the lube oil system, which report was based upon what someone else reported to you; is that correct? 1063]

A. That, and the fact there was an emulsified condition of the oil—a condition of oil and water—and due to the fact that the lube oil cooler was leaking; that was conclusive.

Q. Do you know, of your own knowledge, that the cooler was leaking?

A. Yes—I understand they were—I believe.

Q. But you didn't actually see it, did you?

A. No, I wasn't there at the time of the test, as I recall it now. I was there shortly afterwards, and the other surveyors—we have to work there together—but I can't state that I actually saw the leak itself.

Q. Do you know what type of cooler this was?

A. No, I didn't take that nameplate data, or such as that.

(Deposition of George M. Dupuy.)

Q. Your recommendation concerning the lube oil cooler was that it be soldered where leaking, and proven tight under 100-pound hydrostatic test. Why did you recommend that type of test, Mr. Dupuy?

A. Well, we checked the lube oil pressure, as I recall. I don't recall right now what the pressure was; and we usually tested the top by working pressure.

Q. Is that customarily done, to test the cooler at the top by working pressure? A. Yes.

Q. And is that type of repair, I mean soldering, good practice where you have leaks in this type of cooler?

A. It was soldered; as I understand, it was really just resoldered.

Q. Is a hydraulic test a proper test to make to prove the cooler is water tight?

A. Well, there are several forms of test, but that is just as good as any. Some use air and some use water.

Q. It can be done either way? A. Yes.

Q. Would you say it was the practice to test your cooler by air actuated by a pump developing pressure of between 160 to 200 pounds?

A. The only indication, that there would be a relief valve on the cooler to relieve it from the pressure. I don't think it would be good practice to use—for instance, to use a 200-pound test to test 100 pounds. I don't think that would be good practice at all.

(Deposition of George M. Dupuy.)

Q. Well, assume, Mr. Dupuy, that this cooler was put in a solution at boiling temperature and boiled for four hours, and then placed under an air test with the pressure computed to be between 160 and 200 pounds; in your opinion could that spring a leak in the actual testing"?

Mr. Howard: That is objected to as impropr cross-examination; [1065] not within the scope of the direct examination.

Mr. Hokanson: The whole question is opened up by the direct examination with reference to the cleaning of the coolers and leaks in coolers. The issue here is one of causation and this is certainly within the reasonable scope. He has testified as an expert to Mr. Howard on his direct examination as to cause.

The Court: The objection is overruled.

"A. Well, if you sprung a leak in the testing, that is what it was put in there for, and if it sprung a leak there you might repair it. It also might have sprung a leak with only 5 pounds pressure on it. I believe that is a test, and evidently they put that much pressure on it constant for the purpose of testing it. That is my opinion. But, as I say, I have no definite data on it.

Q. You wouldn't have the data, but you found

(Deposition of George M. Dupuy.)

that submersion was a first test?

A. Yes, submersion was a first test.

Q. Well, Mr. Dupuy, you knew from looking at the oil that there was some emulsified form of some object? A. That is correct.

Q. And the oil that you observed—do you remember [1066] whether that condition was in various low spots of the pit—is that right?

A. In pockets——

Q. Did you sample any of the oil from the day tank? A. No, sir.

Q. If there was some water in the system, it would settle to the bottom, would it not, and there would be an emulsification of the oil at that point?

A. Well, in explanation—if you got water in your oil, it would more or less stay in solution and emulsify throughout. If you had it settle for any length of time, quite a bit would settle out.

Q. The engine was not in operation when you first saw it, was it? A. No.

Q. And it was not in operation until the tests were completed? A. That is right.

Q. And you didn't see the leeks yourself in the cooler, but that fact was reported to you?

A. That is right.

Q. And from those two factors and from your other examination, you conclude in your report with the statement that, 'It appears that the failure of the timing gears was caused by this condition.'

(Deposition of George M. Dupuy.)

Do you mean by that statement that that is your supposition based upon the factors that I have just developed?

A. Well, after the complete examination of the engine and the testing of the vertical shaft for true, and if that was all that could be found at the time —that was the only determining factor.

Q. Considering the extent of your findings, that was a conclusion that you arrived at?

A. Right.

Q. But there could be other causes for galling timing gears in this type of engine, couldn't there?

A. Definitely.

Q. Very many causes? A. Yes.

Q. Now, do you remember how these gears were supplied with oil?

A. They had copper tubing feeder lines, as I recall it.

Q. Do you remember whether the feed lines for the oil lubricated both the upper and the lower timing gears? A. No, I don't recall that now.

Q. Did you check the oil tubing which services these gears, upper and lower?

A. Only a visual examination.

Q. You mean external? A. Yes, external.

Q. Now, on your report you recommend that at the conclusion of the trials after the installation of new gears they should be examined and checked for true alignment. Did you have some doubt in your

(Deposition of George M. Dupuy.)

mind as to whether alignment might be the cause of the galling?

A. Well, the alignment could very easily be the cause of the galling, due to the fact that they were installing new gears, and it is always good policy to check them.

Q. Then having drawn your conclusion that contamination was a cause, you still had some apprehension about the alignment of the gears after they were installed; is that correct?

A. Well, yes — you have — after the new gears were installed, it was customary to check the alignment.

Q. Well, in other words, in this type of engine, in installing gears, if you make improper adjustments you create misalignment of the gears?

A. Yes, I would say so.

Q. Did you examine the thrust bearings on the vertical shaft?

A. Yes; when they were first opened, I saw them.

Q. What was their condition?

A. They appeared to be in good condition.

Q. Would there be any occasion from your examination to replace those thrust bearings? 1069]

A. No.

Q. Do you know whether they were renewed or not?

A. Well, not as far as I know, they were not.

Q. From your examination of this one engine, what parts, in your opinion, should have been re-

(Deposition of George M. Dupuy.)

placed? A. The four damaged timing gears.

Q. Any further parts? A. No.

Q. That would be, then, the two vertical shaft drive gears, upper and lower, which would be a total of four; is that correct? A. Yes.

Q. Did you examine the vertical shaft base bearing bushing? A. Yes.

Q. Was that in good condition? A. Yes.

Q. It did not require replacement, in your opinion?

A. No, in my opinion, it did not require replacement.

Q. Did you examine two ballbearings—I assume those ballbearings referred to here are those in the thrust bearings in the vertical shaft?

A. Why, I don't recall at the moment those particular bearings. One reason is that I never examined them closely on any occasion. [1070]

Q. Would there be any tubing that would be required to be replaced upon the examination that you made?

A. Only those damaged when it was opened up. They had to cut some tubing, as I recall now, to open up the engine.

Q. Did the cam shaft gear require replacing?

A. That was a spur gear—I don't believe so, no; the camshaft drive was in good condition.

Q. What about the vertical shaft gear?

Mr. Howard: Well, what particular gear, counsel?

(Deposition of George M. Dupuy.)

Mr. Hokanson: If reference is made to the upper and lower gears, I suppose this is a duplication, and I will pass that question.

Q. Did you inspect the lower vertical shaft bearings? A. Yes.

Q. Did they require replacement? A. No.

Q. Did you inspect the filter elements?

A. I did not, no.

Q. Were there any gaskets or any pipe that you inspected that required replacement?

A. I didn't inspect gaskets or pipe to that extent.

Q. Did you look at the fuel lines? A. No.

Q. Were there any valves or gauges that were inspected by you? [1071] A. No.

Q. Did you look at the governor? A. No.

Q. Or the governor crosshead assembly?

A. No, I never.

Q. From your inspection of the damage to the timing gears and your knowledge of how this engine is assembled, would there be, in your opinion, any relationship to the damage to the governor or governor crosshead assembly arising out of the galled condition of the gears?"

Mr. Howard: I object to that question on the ground the witness states he did not examine the governor or governor crosshead assembly in the previous questions and answers.

(Deposition of George M. Dupuy.)

Mr. Hokanson: His answer is that he doesn't know, anyway, he didn't want to make a statement.

The Court: Sustained.

"Q. Was this damage that was found of such a character that it could not be corrected or repaired at shipyards outside of the United States?

Mr. Howard: If you know. [1072]

A. I would say it could be repaired in any up-to-date shop in the world who would have the gears.

Q. (By Mr. Hokanson): Assuming you had the gear parts that were damaged, could it be done aboard ship?

A. Well, under the right conditions, yes.

Q. If I remember your testimony correctly, you stated that you did not examine the gears at the conclusion of the sea trial after the repairs had been made. A. That is correct.

Q. So that your report which states, 'At the conclusion of trials, the timing gears were examined and found in good order,' is based, I presume, on what information you received from someone else?

A. That is right.

Q. Do you remember who gave you that information?

A. Mr. Pike, of the American Bureau of Shipping.

Q. You state that four new timing gears were

(Deposition of George M. Dupuy.)

brought on board as spares. Upon whose recommendation was that done, if you know?

A. I believe it was the owner's, but I wouldn't want to state that positively. I believe it was the owner that wished that, however.

Q. Would you have recommended it had the question been asked you?

A. Yes, I believe I would have recommended it.

Q. I mean, placing the spare timing gears aboard the vessel.

A. Yes, I would recommend that in this case.

Q. Why?

A. Because of the trouble they had experienced.

Q. What is the purpose of bluing the gear tooth faces?

A. They put the blue on one of the gears and rolled it and—that is, the two gears would mesh, and then they would roll the gears around, and if there was one that hadn't been blued, then they were aware that actual contact had not taken place, and it was also done on the opposite gear."

The Court: At this point we will take a ten minute recess.

(Recess.)

"Q. Should that have been done in the case of all mechanical gears that are installed?

(Deposition of George M. Dupuy.)

A. In my opinion, yes.

Q. Why is that?

A. You determine the amount of wear you are getting on the tooth face. [1074]

Q. And that is all related to alignment, is it not?

A. That is correct.

Q. And helical timing gears and all such construction that need alignment must be very accurate in order to avoid excess wear, then; isn't that true?

A. That is correct.

Q. Did you examine the spur gears?

A. Yes.

Q. Were they defective in any way?

A. No, not that I could see anyway. They showed no excess wear.

Q. And they are of a steel type and they will all carry a certain load substantially the same as the said timing gears do? A. Yes.

Q. And they were lubricated by the same oil that the timing gears used? A. Yes.

Q. Can you determine from a visual inspection whether timing gears of this type are properly aligned?

A. The only way I could say to determine that would be if they had been in operation for a while and if they showed an excessive amount of wear—well, there is no other chance to check them through——

Q. Through construction, do you mean? [1075]

A. Construction and bluing, etc.

(Deposition of George M. Dupuy.)

Q. Well, when you first saw the different gears, they were still attached to the engine; is that correct? A. Yes.

Q. Could you determine from an inspection of them in the condition that they were found to be in whether they had been in proper alignment prior to the wearing and galling?

A. I would say no.

Q. You could not? A. No.

Q. So that you would not be prepared to say that those gears were in proper alignment before the galling took place; is that correct?

A. That is correct. I wouldn't be prepared to say that.

Q. And no one else who inspected them in the condition they were in when you found them could state positively whether they were in proper alignment or not; isn't that correct?

A. In my opinion, that is correct. I don't see how anybody could tell whether they were worn out.

Q. Now, Mr. Dupuy, you have had some considerable experience as a marine engineer, haven't you? A. Yes.

Q. Referring to your survey report, Exhibit Z-1 to-8 inclusive, and to page Z-8 thereof, which contains [1076] translated extracts from the engine log of the Urania, you will notice, "0800 on October 31: the vertical drive shaft was taken out to a machine shop on shore and checked for bend." It

(Deposition of George M. Dupuy.)

further states that a slight bend was rectified on lower part of vertical shaft. Could the bend on the vertical shaft cause misalignment of the gears?

A. Well, bend on the shaft would cause the gears to run out, yes—that is correct.

Q. And that could cause galling or wearing, could it not? A. Yes.

Q. Could a contaminated oil line leading to these gears result in the galling or wearing of these gears?"

Mr. Hokanson: The last question, beginning at line 14, page 168, I believe contains a typographical error; "contaminated oil line," I believe it was "plugged oil line."

Mr. Howard: I stipulate that should read "plugged oil line," line 14, page 268.

"A. Yes.

Q. By depriving the system of proper lubrication? A. Yes. [1077]

Q. Mr. Dupuy, assuming that the engine of this ship was stopped and it was then discovered after inspection that timing gears were galled; and assume further that the engineers also discovered the oil was very dirty and showed signs of contamination; and assume further that without determining the cause of the contaminated oil the contaminated

(Deposition of George M. Dupuy.)

oil was thrown out and new oil put in, and that new gears were then installed, and the actual cause of the galling of the gears had not been determined, and the engine was then run; would that in your opinion be sound engineering practice?"

Mr. Howard: I would like to enter an objection to that question on the basis that it assumes a fact that the contamination of the lube oil was discovered, and the oil was very dirty and showed signs of contamination as discovered by the engineer when the engine was stopped. I submit to Your Honor there is no evidence whatever in the record that that condition existed.

The Court: Have you a promise to make in that connection similar to the promise made before?

Mr. Hokanson: May it please the Court, I believe there is testimony in the record up to this point establishing that it was known to the chief engineer, at least that there was difficulty with the oil, from [1078] his own deposition. If that has not already been established, I believe that from a construction of all the testimony heretofore given that certainly that fact can be established.

Mr. Howard: You say that it can be established?

Mr. Hokanson: Yes.

The Court: You mean if the Court takes the view of the evidence which you take that is a fact that is established?

(Deposition of George M. Dupuy.)

Mr. Hokanson: Yes, Your Honor.

Mr. Howard: I renew my objection on the ground that there is no testimony in the record that the engineer discovered the oil was very dirty after this breakdown when the engine was stopped. If counsel says he will produce evidence to that effect, with that promise I would abide by the Court's ruling.

The Court: The objection is overruled upon the assumption counsel can point out some such evidence, or inferences from evidence, indicating that fact.

"Mr. Howard: Do you understand the question, Mr. Dupuy?

The Witness: I think I see what he is driving at.

That they never determined the cause of the contamination of the oil? [1079]

Of course, I think that was an error on the part of the engineer, in not determining the cause.

Q. (By Mr. Hokanson): That would be your opinion, would it? A. Yes.

Q. Now, again referring to Claimant's and Cross-Libelant's Exhibit Z-8 for identification, you will notice that it states that the engine timing was commenced on November 1st and continued until 1100 on November 3rd. Is that a normal time that should be consumed in the timing of an engine of that type?

(Deposition of George M. Dupuy.)

A. I would say it was not unusual, when you are renewing gears. In other words, for all renewing of timing gears, it is not unusual that you take considerable time for everyone to take the engine and get it back to the timing.

Q. You will notice that after the thing was completed the engine was run full ahead and operation of the engine was uneven and irregular, and the pistons were hitting the valves.

Now, in your opinion, if the engine was timed properly, would that condition exist?

A. Why no. They would have to adjust the timing again.

Q. When timing an engine of this type, you jack your engine over in effecting a timing, don't you?

A. I believe so, yes. [1080]

Q. And shouldn't great care be exercised in the process of completing the timing, to avoid the condition which developed here after the timing was completed?

A. Yes, precaution should be taken.

Q. Isn't that a very unusual condition?

A. No, I wouldn't say on this design of engine. I am not familiar enough to state that that is unusual in this type.

Q. Well, it would be unusual in most Diesel engines, would it not?

A. I would rather not say.

Q. Well, that condition is a very dangerous one, is it not, as far as damage to the whole engine is concerned?

(Deposition of George M. Dupuy.)

A. Well, this thing of pistons hitting the valves, etc., that don't make sense to me anyway; not in my knowledge of Diesel engines.

Q. It causes certain changes; is that correct?

A. That is right—if you want that conclusion. I don't think it is the timing. In my opinion, I don't see how the timing could cause that condition of the pistons hitting the valves.

Q. Might not any condition be caused if the intake valve were full open on the top center?

A. I am not familiar enough with this design of engine to answer such a technical question. [1081]

Q. Well, assuming that the pistons had hit the valves, wouldn't that cause a severe strain on the camshaft and the timing gears?

Mr. Howard: I will object to the question—the witness has now stated he is not familiar enough with this type of Diesel engine to answer questions dealing in such technicalities."

Mr. Hokanson: The witness' answer, anyway, is inconclusive.

The Court: The objection is overruled.

"The Witness: I would rather say that I am not familiar enough to make a statement on that.

Q. (By Mr. Hokanson): You did examine the camshaft, didn't you, Mr. Dupuy? A. Yes.

Q. And you saw how it was connected with the timing gears, did you? A. That is correct.

(Deposition of George M. Dupuy.)

Q. And the principle is not essentially different from any other overhead camshaft installed on Diesel engines, is it?

A. No, not that I know of. [1082]

Q. If you are able to state, if a valve were struck by a piston wouldn't the force be transmitted to the rocker arm and to the shaft and back onto the timing gears?

A. I would rather not answer that. I am not prepared to answer that. I would have to study up on that to give you an answer to that question.

Q. Assuming, without requiring you to give an opinion as to that—assuming that there were back thrusts on the timing gears from that condition—could that cause a misalignment?

(No answer by the witness.)

Mr. Howard: Do you understand the question, Mr. Dupuy?

The Witness: Cause misalignment?

Q. (By Mr. Hokanson): ——of the timing gears, yes—temporary or permanent?

(No answer by the witness.)

Mr. Howard: Would you like to have the questions read to you again before you answer?

The Witness: Yes.

(The last three questions were read to the witness by the reporter.)

A. Well, it would increase the pressure on the gear faces and cause excess wear.

Q. (By Mr. Hokanson): Do you know what

(Deposition of George M. Dupuy.)

the capacity of the oil system was on the Tanker Urania? [1083]

A. Do you mean the number of gallons in the lubricating oil system?

Q. Yes. A. No, I do not.

Q. Assume that this engine became overheated, and assume, further, that the temperature of the lubricating oil had risen to a level temperature in excess of safe operating procedure; and assume that, in order to bring down the temperature of the lubricating oil, increased flow and pressure of the salt water coolant were directed to the lubricating oil cooler by use of an auxiliary pump; in your opinion could a sudden flow of cool water cause a contraction of the tubes in the lube oil cooler to such an extent that leaks could develop thereby?"

Mr. Howard: I object to that question on the basis of the fact that the assumption that the temperature of the lubricating oil had risen to a level temperature in excess of safe operating procedure, and that to bring down the temperature of the lubricating oil, increased flow and pressure of salt water coolant directed to the lubricating oil cooler, has not been established as a fact prior to the first breakdown, at least, of this engine on this vessel.

The Court: Do you think one might argue from facts proven that the temperature had become excessive?

Mr. Howard: I think the entries in the engine-

(Deposition of George M. Dupuy.)

room logs speak for themselves, the engineroom logs admitted in evidence. I submit the entries will show that the temperature of the lubricating oil had not risen in excess of safe operating procedure.

Mr. Hokanson: Your Honor, I will withdraw the question.

The Court: The question is withdrawn, and the answer, also.

"Q. If there were leaks in the cooler under normal operating pressure on both sides, the lube oil and the salt water, could you get salt water in the lube oil?

The Witness: May I have that again, please?

(The pending question was read by the reporter.)

The Witness: I don't have the pressures. I don't know what the existing pressures were on both sides of that.

Q. (By Mr. Hokanson): Well, in lube oil coolers, which pressure is higher under a motor driven by the pump system—the lube oil side or the salt water side?

A. In most cases, if the equipment is in proper adjustment, the lube oil is the highest. [1085]

Q. And that being the case, assuming the lube oil pressure is higher, even if you have leaks in the cooler, could the salt water get into the lube oil?

A. The salt water can't get into the lube oil under those conditions, no, not while in operation.

(Deposition of George M. Dupuy.)

Q. As an ex-seafaring engineer, Mr. Dupuy, and considering your acquaintance with engine log entries, do you feel that the log, the engine log, covering the period from August 26th through November 11, 1948, is an adequate record of the mechanical difficulties of the Tanker Urania on the trip, of what you found upon her arrival?

Mr. Howard: I shall object to that question because the witness has not been shown the engineroom log of the Tanker Urania.

Mr. Hokanson: He has been shown what has already been testified to as extracts furnished to him by the owner or a representative of the owner, of the engineroom log."

Mr. Hokanson: Mr. Howard, will you stipulate that there is an error in the last question, that the word August should be October, "from October 26th through November 11, 1948"?

Mr. Howard: Yes, I so stipulate.

Mr. Hokanson: May it please the Court, the report [1086] which has been offered by this surveyor whose testimony is under consideration contains extracts from the log which he has earlier testified to as having been translated at his request. It is with respect to those entries that this question is concerned, and I submit that is a proper question.

(Deposition of George M. Dupuy.)

"Mr. Howard: I have no objection to his answering the question now propounded to him. He does not, however, have the engine room log in front of him.

Mr. Hokanson: You may answer the question, Mr. Dupuy.

A. The translation as written here is free——

Q. Assuming the translation is a literal translation of the entries made, would your answer be the same?

A. Well, I would say that that log is—that it more or less covers the accident—leaving out the minor details.

Q. What is customarily recorded in the engine room log?

A. Customarily temperatures, etc., and any comments on operation of equipment during the period that you are on watch.

Q. Where you have a major breakdown and you have only what you are given from the engine room log of the difficulties that you found when the vessel arrived and was [1087] inspected by you, in your opinion is this engine room log fully explanatory in details which are customarily entered in the normal practice of keeping an engine room log?

A. Well, I would rather not answer that question. It gets too involved. Everybody keeps a log different.

Q. Is it customary to log all oil changes in the engine room log? A. Yes.

Mr. Hokanson: I believe that is all.

(Deposition of George M. Dupuy.)

Redirect Examination

By Mr. Howard:

Q. Mr. Dupuy, counsel has inquired as to the sufficiency of the log entries as reflected in the extracts that were attached to your report or survey, and which is now a part of the record and marked by the reporter for identification as Claimant's and Cross-libelant's Exhibits Z-1 and Z-8, inclusive. Do you know whether the original log as maintained aboard the Tanker Urania carried entries recording the number of revolutions per minute for any particular time?

A. No, I didn't go into any of that.

Q. Now, do you know whether the original log maintained in the engine room of the Tanker Urania carried entries for this period covering such situations as the amount of fuel consumed in the main engine and in the auxiliary [1088] engine and the pressure which is maintained in the lubricating oil system, the fuel oil pressure, the pressure of the fresh water in the circulating system, temperatures of the sea water, temperatures of the pistons or around the pistons, temperature of the lubricating oil in and out of the cooler, and the temperature in the engine room and similar items, as far as the auxiliary engines are concerned?

A. I never saw that log.

Q. You don't know whether a record was made on the original log of such items as that?

A. No, I don't.

(Deposition of George M. Dupuy.)

Q. When you make extracts from an engine room log for the purpose of attaching it to your survey report, do you usually make an extract of all such entries as I have just enumerated?

A. If they are directly concerned with the accident, you do, yes.

Q. Otherwise you do not?

A. No; unless it is concerned in the accident.

Q. At the time you made this survey of the Tanker Urania at Long Beach, did you know that a service engineer of the Union Diesel Engine Company had been aboard the vessel on its last breakdown—at the time of the last major breakdown?

Mr. Hokanson: I shall object to that as improper redirect examination."

Mr. Hokanson: My objection is renewed.

The Court: The objection is overruled.

"A. I was told he was on board at the time of the second—do you refer to the second breakdown?

Q. (By Mr. Howard): Yes.

Mr. Hokanson: As the last?

The Witness: Yes.

Q. (By Mr. Howard): And, with that in mind, do you know who determined just what parts were to be replaced by the Union Diesel Engine Company on the Tanker Urania? Who determined

(Deposition of George M. Dupuy.)

what parts were to go in? Did you specify what parts were to be replaced.

A. I recommended that four gears be put in.

Q. Beyond that, did you undertake to specify any further repairs?

A. New repairs, no, sir.

Q. Do you know whether the Union Diesel Engine Company's service engineer found it necessary to replace any other parts of the main engine?

A. Not that I know of. [1090]

Q. Now, as a result of that inspection of the engine when opened up upon arrival at Long Beach and the check that was made of the alignment of the vertical shaft, the condition of the vertical shaft—did you then eliminate misalignment as a possible cause of the galling of the gears?

Mr. Hokanson: I shall object to the question in its present form as being leading, and also beyond the scope of proper redirect examination."

The Court: It certainly is leading. The objection is sustained.

"Mr. Howard: After the repairs had been made at Long Beach, including the repair of the lubricating oil cooler, the leaks that were reported in the lubricating oil cooler, did you yourself observe or did you receive any report of any further leaks in the lubricating oil cooler—any further leaks?

(Deposition of George M. Dupuy.)

A. After it was reinstalled in the vessel, do you mean?

Q. Yes.

A. No, sir, I heard nothing further about it.

Q. After this heat exchanger or cooler was subjected to 160 to 200 pounds of pressure while testing it at Long [1091] Beach or Los Angeles, any leaks that might have been discovered then must have been repaired?

Mr. Hokanson: I shall object to the form of the question as leading and beyond the scope of proper redirect examination."

Mr. Howard: I will withdraw the question.

The Court: You may proceed.

"Mr. Howard: I have no further questions.

Recross-Examination

By Mr. Hokanson:

Q. When you said that in your opinion the gears were in proper alignment, in answer to Mr. Howard's question, I take it you have reference to the time after the new gears had been installed."

Mr. Hokanson: If the Court please, his answer to the question on which this question is based has been stricken.

(Deposition of George M. Dupuy.)

The Court: This will be stricken, too.

Mr. Hokanson: Yes. The question beginning on [1092] line 4, page 280—I move that the question be asked subject to whatever objections may be made.

The Court: Is there any objection to starting with line 4, page 280?

Mr. Howard: No, Your Honor.

The Court: You may do so.

"Q. You previously testified that in your opinion it could not be determined whether there was any misalignment of the gears prior to the galling, in the condition you found them when you inspected it; is that right?

A. Prior to the galling, did you say?

Q. Do you understand my question?

A. Whether the gears were installed originally in misalignment; is that it?

Q. Perhaps I can simplify my question——

A. Well, I don't know that.

Q. You don't know that? A. No.

Q. You couldn't tell whether they were in proper alignment prior to the time the galling occurred or not? A. No.

Mr. Hokanson: I think that is all.

Mr. Howard: That is all. I have nothing further." [1093]

Mr. Howard: That concludes the deposition of

(Deposition of George M. Dupuy.)

Mr. Dupuy, which I offer in evidence at this time as part of the cross-libelant's case in chief.

The Court: It is so received in evidence.

Mr. Howard: I would like next to read into evidence the deposition of Mr. Harry J. Summers, beginning at page 194 of the same cover.

DEPOSITION OF HARRY J. SUMMERS

"Direct Examination

By Mr. Howard:

Q. Will you state your full name, please, and your place of residence?

A. My name is Harry J. Summers. I live at 1217 Leland Street, San Pedro, California.

Q. And what is your occupation?

A. I am a retired marine surveyor.

Q. And how long have you been in the marine surveying business?

A. I have been with the American Bureau of Shipping for thirty years and two months as principal surveyor in this port.

Q. And when did you retire?

A. The first of March, 1948.

Q. Since that time have you acted independently as [1094] a surveyor on occasions?

A. Yes; I have taken a few small investigating jobs and brief survey work—just at the request of some friend who wanted me.

Q. Mr. Summers, do you expect to be in the

(Deposition of Harry J. Summers.)

State of Washington on or about April 6, 1949?

A. No, sir, I do not."

Mr. Howard: The witness waives reading and signing the deposition. Line 21, page 195.

"Q. Mr. Summers, in the month of November, 1948, did you perform some services as a surveyor in connection with the tank vessel Urania?

A. Yes. The report I made is dated November 19, 1948.

Q. At whose request did you perform the services?

A. At the request of the General Steamship Corporation, agents for the owners of the vessel.

Q. And on whose behalf were you acting in performing these services?

A. Well, I take it that I would be working for the owners of the vessel.

Q. And where was the vessel located at that time? [1095]

A. At the Craig Shipyards, at Long Beach, California.

Q. When did you first investigate the vessel?

A. My first attendance was on November 11, 1948.

Q. Were you present when the vessel arrived at the Craig Shipyards?

(Deposition of Harry J. Summers.)

A. No; she came into the yard and went to the dock, and I saw it there.

Q. State whether or not any other surveyor or technical representatives were present at the time you did inspect the vessel on November 11, 1948.

A. Yes, there were others who attended the boat. There was Mr. E. W. Pike, representing the American Bureau of Shipping; Mr. George M. Dupuy, representing Lloyd's agent—he is a local surveyor—because Lloyd's regular surveyor was incapacitated and he acted for him; and then there was a man by the name of Cross representing the Union Diesel Engine Company; and there were two other men, I believe, from the Engine Company.

Q. And what did you do when you went on board the vessel? Was there some particular portion of the vessel that you were concerned with, as far as survey was concerned?

A. The vessel had developed main engine trouble and was required to be towed in, and so I was requested to attend for the opening up and examination of the main engine.

Q. And that was your assignment on this occasion? [1096] A. Yes.

Q. And were you concerned with any other repairs or service furnished to the vessel at Los Angeles, or Long Beach?

A. No, I would say that we were concerned only as far as the main engine was involved. There was a boiler or something that was being placed aboard

(Deposition of Harry J. Summers.)

the ship, but I paid no attention to it whatever, and had no part in its examination or testing.

Q. Your services, then, were confined to the main engine and the conduct of any repairs received? A. That is right.

Q. Can you state for us, please, what condition you found the main operating engine on the Tanker Urania to be in when you first inspected it on November 11, 1948?

A. The first thing we saw was some galled gears in the timing gears; that is, those that operate the cam shaft.

Q. And were the gears opened up at the time you first saw them, or were they still in place aboard the vessel?

A. Well, when I saw the gears, as I recall it now, there had been a previous set of gears installed and they were out on the floor plates.

Q. The previous gears were out on the floor plates, did you say?

A. Yes; those were damaged and badly cut up, and then the other gears were being removed when I got down there, [1097] and they were subsequently examined and found to be badly cut and worn.

Q. But they were still being removed when you got there, were they?

A. Yes; the workmen were around there, and there was no point going to look at them in there when they were to be taken out.

Q. Now, first, as to the other gears you observed

(Deposition of Harry J. Summers.)

on the floor plates in the engine room, the previous set of gears, can you identify them as to what gears they were?

A. They were the helical gears from the vertical shaft.

Q. State, if you know, what the condition of those gears was—from your observation.

A. I would say they were destroyed because of excessive galling and cutting.

Q. Were both the upper and the lower gears destroyed or damaged?

A. Yes, they were destroyed or badly cut and galled.

Q. What was the nature of the galling or cutting on these gears that you observed on the floor plates of the engine room of the Tanker Urania?

A. The nature——

Q. Yes. Was the galling and cutting regular or uneven?" [1098]

The Court: May I interrupt you? Do both counsel agree or disagree as to whether or not the helical gears were the same as the timing gears?

Mr. Hokanson: I believe we are in agreement that the timing gears are helical gears, the term helical gears describing the type.

The Court: Do you agree that this witness was referring to one and the same gears when he spoke one time of the timing gears being galled and the other time of the helical gears being galled?

(Deposition of Harry J. Summers.)

Mr. Hokanson: Yes, Your Honor.

The Court: Is that your understanding?

Mr. Howard: That is my understanding, Your Honor.

"A. Well, I think the appearance of the first gears paralleled the appearance of the second set of gears, as far as I remember.

Q. Let's look at the first set of gears on the floor plates.

A. You mean the nature of the cutting or galling?

Q. Yes, if it was even or uneven.

A. No, the cutting on those gears, as I recall it, was irregular and spotty, as you can term it. In fact, on one side of the gear there would be perhaps severe cutting [1099] and on the other side of the gear it would be tapered off and not so bad, but very irregular.

Q. By the way, do you know what eventually happened to those gears on the floor plates of the engine room? Do you know what disposition was made of those gears?

A. I do not. They were removed from the ship, maybe—I don't know.

Q. As to the gears of that main engine that were in the process of being dismantled when you inspected them, state what the condition of those gears was.

(Deposition of Harry J. Summers.)

A. The cutting and galling was irregular on those gears also.

Q. Both upper and lower gears? A. Yes.

Q. Was the damage to the lower gears greater or less than the damage to the upper helical gears, if you know?

A. Well, I would say that the upper gears, as I recall it now—the upper gears were perhaps a little worse—in a little worse condition than the lower ones were.

Q. Now, do you know what happened to those gears that were in the process of being removed from the main engine when you inspected it?

A. Do you mean the final disposition of them?

Q. Yes. Were they left aboard the vessel?

A. They were, as far as I know. They were being [1100] handled by the Union Diesel Engine people.

Q. Do you have in your possession any gears that were removed from the vessel?

A. No, I do not.

Q. Did you inspect any other portions of the main engine on this occasion of your first inspection aboard the vessel?

A. We took this vertical gear out and took it to the shop and tested the shaft in a lathe, and it ran true. It was not out of alignment as far as the shaft thrust was concerned.

Q. Were you present at the time?

A. Yes, I watched it done.

(Deposition of Harry J. Summers.)

Q. Well, the shaft was placed in a lathe and then what test was made?

A. It was tested in the lathe with indicators that show if there is any misalignment or any changes in the shaft, and the shaft was found true.

Q. Can you describe for us the size and general nature of the vertical shaft that you are referring to—the dimensions, etc., as close as you can recall?

A. Well, the shaft was about an inch and three-eighths in diameter.

Q. An inch and three-eighths? A. Yes.

Q. And how long, approximately?

A. Oh, approximately about 50 inches. Mind you, this is just a picture I am giving you. I didn't measure the shaft.

Q. I am just asking you for your best estimation on it. A. Yes, that is right.

Q. And of what material was the shaft constructed?

A. It looked to me like it was probably made of carbon steel.

Q. Did you inspect any other portions of the main engine?

A. I examined the crank case and found the water in the oil.

Q. In the crankcase? A. Yes.

Q. How much oil was in the crankcase at the time of your examination?

A. Well, not an operating amount. It had been partially drained out, but we found evidence of salt water in the oil.

(Deposition of Harry J. Summers.)

Q. How did you determine that there was water in the fluid on the crankcase?

A. Well, that is a matter of samples that they had—it showed water in them.

Q. Was any particular test made of those samples?

A. I think there was, but I did not see a laboratory analysis on it or the test results. I didn't see that [1102] personally. But I did do this—one of the boys had a sample of the oil there which I assumed was dipped out of the crankcase. I wasn't there when he did it, but I assume that he got this oil from there, and he brought it up to me as a specimen of the oil, like we do sometimes if we have a suspicion of salt water, and we dip our finger into it and taste it; and in this instance there was evidence of salt, and so there must have been considerable salt."

Mr. Hokanson: I move to strike the answer as not responsive.

The Court: The motion is denied.

"Q. Well, what did they do on this occasion?

A. They did the same thing on this occasion—from this sample that they brought to me. Ed Pike brought it up to me.

Q. And you tasted the sample, did you?

(Deposition of Harry J. Summers.)

A. Yes, I tasted the sample.

Q. Did you feel that by that method you could determine whether there was salt or fresh water in the sample?

Mr. Hokanson: I shall object to the form of the question, since it involves the emotion of the witness and is not based on fact." [1103]

The Court: Thae objection is overruled.

"Mr. Howard: You may go ahead and answer, Mr. Summers.

(Discussion by counsel off the record.)

The Witness: May I have the question read, now?

(The pending question was read by the reporter.)

A. Yes; but such determination should be further confirmed by a laboratory test.

Q. (By Mr. Howard): Do you know whether that was done in this case?

A. I believe that it was done, but I did not personally see the results.

Q. You never saw the report?

A. No. In fact, we didn't prepare——"

(Deposition of Harry J. Summers.)

(Survey marked Respondent's Exhibit A-23 for Identification.)

"Q. Now, Mr. Summers, I am handing you what has heretofore been marked by the court reporter for identification as Claimant's and Cross-Libelant's Exhibit Y for identification. Can you state what that is, please (handing document to the witness)?

A. That is a report that I made on November 19, 1948, in connection with this particular damage and survey.

Q. And is that report—does it represent your findings as a result of your attendance on the vessel in question? A. That is correct.

Q. And to whom was that report submitted?

A. By me it was turned over to the General Steamship Corporation.

Q. Did you present a statement for the services that you had rendered in this connection?

A. I rendered them a bill, yes.

Q. I show you now what has heretofore been marked by the reporter as Claimant's and Cross-Libelant's Exhibit T-2 for identification, and I will ask you to state what that is, please, if you know (handing document to the witness).

A. An invoice for the charges in the amount of $200.

Q. And that covers your services, does it?

A. Everything of my services, yes.

(Deposition of Harry J. Summers.)

Q. And has that bill been paid?

A. Yes, I have received payment.

Q. And how were your charges for these services computed?

A. Rendered on the number of visits and the time, that is, based on the number of visits. [1105]

Q. Well, do you have a record of the number of visits that you did make to this vessel in question?

A. Well, now, let's see if I do have that. I would say five or six visits. I remember the first day was on Armistice Day. That is the day the ship arrived, and there wasn't too much going on. Say six visits all together.

Q. Now, does this fee of $200 as set forth in Claimant's and Cross-Libelant's Exhibit T-2 for identification, represent your usual charge for similar services? A. Oh, yes.

Q. State whether or not that corresponds to the prevailing rate for that type of service in the Los Angeles area.

A. Yes. There has been no criticism.

Q. Well, if similar services were being rendered to another vessel over corresponding services you rendered on the Tanker Urania, state whether or not the fee would be different.

A. No, it would be just the same.

Q. Now, going back, Mr. Summers, to your inspection of the vessel, will you state whether you inspected any other portions of the main engine on your initial visits aboard the ship?

(Deposition of Harry J. Summers.)

A. We examined the bearings of the vertical shaft.

Q. What condition did you find the bearings of the [1106] vertical shaft to be in?

A. Satisfactory.

Q. Was there any evidence of damage to those bearings? A. No.

Q. Please continue.

A. We examined the other chain of gears operating from the main crankshaft, which are plain spur gears, and these were not found to be damaged.

Q. Did you examine any of the cylinders?

A. One cylinder, I think—the No. 2 cylinder—if that is the one that had a leak around the fuel injection, and that leak had been repaired when I saw it, and it was considered satisfactory.

Q. Do you know what repair had been made at that point?

A. Well, it was—I don't know just the details of that repair, but anyway they tested it and there was no water coming out, and it was considered satisfactory as far as I was concerned.

Q. Did you examine the main engine crankshaft?

A. Just superficially, because the crankcase was open, and what I saw was satisfactory—I did not open any bearings.

Q. Did you examine the thrust bearing?

A. Do you mean the main thrust?

Q. The main thrust bearing, yes.

A. I don't recall—yes, the main crankshaft and

(Deposition of Harry J. Summers.)

thrust bearings were checked and checked for alignment, and found satisfactory. I wasn't there at the time the alignment was checked, but I had a look at it, and it seemed to be the consensus of opinion that the alignment was satisfactory, and I didn't put any restrictions on it myself.

Q. Did you inspect or examine any other essential parts of the main engine of the Tanker Urania?

A. Well, just the—there was some lubricating oil coolers and some fresh water coolers that had developed leaks.

Q. And what did you find in the lubricating oil cooler on your inspection that you made?

A. Well, the lubricating oil coolers—Now, here is another point I want to make clear on the lubricating oil situation. I wasn't there when those things were under pressure. The boys found some leaks in them, and they said, "Now, we will take them off of the engine and send them to the service people who manufacture this stuff, and have them cleaned and tested and repaired and reinstalled in good order."

Mr. Hokanson: I move to strike that as not responsive and based upon hearsay, Your Honor.

The Court: I think it should be stricken. It is stricken. [1108]

Mr. Howard: That sentence beginning, "The boys found"——?

The Court: Yes, "Here is another point I want to make clear.

(Deposition of Harry J. Summers.)

Mr. Hokanson: I think that the part that should be stricken is beginning with, "I wasn't there when those things were under pressure."

Mr. Howard: If the Court please, that is entirely responsive.

The Court: The striking will commence, "The boys found some leaks"——, and will continue for the rest of the witness' answer.

"Q. Who found the leaks?

A. The Union Diesel Engine men did."

Mr. Hokanson: I object to the answer as involving hearsay again. The ultimate fact is; were there leaks? He states somebody else found them. He states earlier that he wasn't present; therefore, it is hearsay. I move to strike the answer.

The Court: I do not know, Mr. Hokanson, that that [1109] is a necessary conclusion. All the persons around the job at the time may have acted as though the Union Diesel engine men did make the finding, and if their actions indicated as such, this man might state what the fact was.

The objection is overruled.

* * *

"Q. You yourself didn't find the leaks, then, did you?

(Deposition of Harry J. Summers.)

A. I didn't locate the leaks—I couldn't see them —but when they had one of the coolers out, as I recall, there was some leaks in the top sheets. They are a light constructed affair.

Q. Were the lubricating oil coolers opened up when you first went aboard the vessel? A. No.

Q. Was the cooler still in place?

A. It must have been because this was a couple of days after.

Q. Were there any other parts of the main engine that you have not previously mentioned that were subjected to an inspection and examination by you prior to the performance of repairs in Long Beach?

A. No, our examination was concentrated on the gears—what [1110] caused the trouble and what we should do to get it repaired and get the ship going. So we didn't go—After we found what we thought was the meat of the trouble, why, of course, we didn't go into the thing for a much further analysis.

Q. Was any effort made to operate the main engine of the Tanker Urania upon arrival at Long Beach and while you were aboard? A. No.

Q. Did you consider it possible to operate the vessel?

A. Not with the timing gears that were in her when she came in.

Q. Now, did you continue to attend on the vessel during the course of the repairs? A. Yes.

Q. And will you state, if you know, who made the repairs on the main engine?

(Deposition of Harry J. Summers.)

A. The Union Diesel Engine people had mechanics on the job supervising the carrying out of affairs. And the Craig Shipyard people did some of the incidental work.

Q. What repairs were made on the main engine at Long Beach, to your best knowledge?

A. New gears and two new thrust bearings were supplied and installed, and new governor crossheads and new lubricating oil lines. [1111]

Q. Now, the new gears which you have mentioned, and which you also mentioned in your report which is now identified as Claimant's and Cross-Libelant's Exhibit Y for identification herein—just what gears are you referring to?

A. The helical gears on the vertical shaft.

Q. Both upper and lower?

A. Those are part of the engaging gears.

Q. And the thrust gears you referred to——

A. They were on the same shaft.

Q. On the vertical shaft, do you mean?

A. Yes; that is as I get it.

Q. The governor crosshead was replaced; can you state why it was necessary to replace that part?

A. I did not check that. It was in the recommendation of the engine people.

Q. You have indicated that new lubricating oil lines were supplied. In what portions of the engine were those lines installed?

A. These new lubricating oil lines were installed by the Union Diesel Engine Company's engineers

(Deposition of Harry J. Summers.)

for the purpose of insuring adequate supply to these particular gears that gave trouble. They just directed the flow of oil more particularly so as to be sure that they received proper lubrication. [1112]

Q. Do I understand that when you referred to the lubricating oil lines that they were installed to the gears on the vertical shaft?

A. Yes, to the assembly—yes; and that was done, I believe, when they installed the first set of new gears.

Q. Would that have been done prior to the arrival of the vessel at Long Beach?

A. Yes, that was done prior.

Q. Were you aboard the vessel after the repairs were completed and during the time that the dock and sea trials were conducted?

A. I was on the vessel during the dock trial.

Q. Will you state the manner in which the main engine performed or operated at that time?

A. Satisfactorily at that time.

Q. How long were the main engines operated on that occasion—approximately?

A. I don't know for how long they were run, but I know I was there when we started up, and we run for half an hour, or from the time I went uptown to Long Beach and I came back again, and it was still running, and everything was in order.

Q. During the dock trials did you test the oil in the crankcase? A. No.

Q. Did you make any effort at that time to

(Deposition of Harry J. Summers.)

determine [1113] whether or not there was any contamination of the lubricating oil?

A. The lubricating oil was completely renewed after the repairs. The crankcase was completely cleaned out, and what lubricating oil was there was drained out and new oil supplied.

Q. During the dock trial did you check——

A. No, I didn't go into that any further.

Q. Did you check to determine whether there was any difficulty with the gears on the vertical shaft?

A. Well, we examined the gears after the run and we found no indications of galling or marking or excess wear or anything that indicated that it wasn't all satisfactory and it seemed to be quite in order.

Q. By the way, Mr. Summers, are you a graduate engineer? Do you hold an engineering degree?

A. You mean a college degree?

Q. Yes.

A. No, I have never completed my full college. I started at Ann Arbor and attended the University of Michigan for a short time.

Q. What course did you take?

A. Engineering; but that was a long time ago.

Q. When was that, incidentally?

A. Well, let's see; that was about 1902. [1114]

Q. Do you hold a license, either an engineer's license or a deck license——

A. I don't have a marine engineer's license. I

(Deposition of Harry J. Summers.)

have a license from the State of Illinois as a steam engineer, however.

Q. Now, you stated that you have been in the surveying business in this locality for at least thirty years. A. That is right.

Q. Principally for the American Bureau of Shipping?

A. Entirely for the American Bureau of Shipping.

Q. Up to the time of your retirement?

A. That is right.

Q. During that period of time will you state whether you have had occasion to inspect or survey other Diesel engines?

A. Yes, I have; I have examined quite a number of Diesel engines during that experience.

Q. Can you give us any idea as to how frequently you have been called upon to examine Diesel engines?

A. Well, I don't know what you mean by frequently. I have examined Diesel engines—on Standard Oil ships and on American-Hawaiian ships, and on Japanese ships.

Q. Have you ever been called upon to examine Diesel engines on tugs?

A. Well, only during the time of construction.

Q. How about fishing vessels?

A. Oh, I have had very little experience with fishing vessels and the smaller Diesel engines. It

(Deposition of Harry J. Summers.)

has been mostly higher powered Diesel engines that I have inspected.

Q. Have you had any experience with reference to Diesel engines inspected for the Union Diesel Engine Company?

A. No, I would say not. There may have been some vessels go through my hands with Union Diesel engines in them, but I can't specifically name them.

Q. Incidentally, what is the type of state engineering license that you hold?

A. Well, it is a steam engineer's license.

Q. Do you know what the pressures are that are prescribed by the manufacturer to be maintained on the lubricating oil coolers on either the lubricating oil side or the salt water side?

Mr. Hokanson: Generally or specifically—as to what coolers?

Mr. Howard: On the lubricating oil cooler—as prescribed by the manufacturer.

Mr. Hokanson: Are you referring to any coolers?

Mr. Howard: On the Union Diesel Engine Company's unit that was installed aboard the Tanker Urania.

A. No, I wouldn't know that, because usually the Diesel engine manufacturers supply instruction books with specific [1116] directions for the operation of their products, and it would be a matter of reading it, and everybody knows it.

Q. Do you know whether such an instruction book was carried aboard the Tanker Urania?

(Deposition of Harry J. Summers.)

A. I didn't see it. I can't answer that question.

Q. During the time that the Tanker Urania was in Los Angeles, or rather at Long Beach, did you have occasion to observe the chief engineer in the performance of his duties from time to time?

A. Well,—that is one of the things I usually looked for—is the competency of the chief engineer, and my impression of this man was——

Q. No; just a minute. You did observe the man, did you? A. I observed the man, yes.

Q. Did you see him during the course of the repairs on the main engine?

A. Yes, I saw him around a good deal.

Q. And was the chief engineer present and performing his duties during the dock trial?

A. Oh, yes.

Q. State from your experience and from your observation whether you consider the chief engineer aboard the tanker Urania to have been experienced in the operation of Diesel engines." [1117]

Mr. Hokanson: I object to that question, Your Honor, on the ground that from observing, mere observation, it is impossible for even an expert to state whether a man is competent to operate a particular engine. That doesn't imply what he knows about it or whether he is acquainted with the operating techniques invloved.

Mr. Howard: I think this witness has qualified himself to express an opinion as to the competency

(Deposition of Harry J. Summers.)

of the chief engineer and whether he was competent to operate the engines. He said he saw him during the course of the work and observed all steps of the repair.

The Court: I may be running the risk of calling to my assistance in ruling upon the question the usual interest that was displayed by marine surveyors towards the ship personnel who are chiefly interested in the defects under consideration.

It seems to me, from what I would observe generally in life about the work of a marine surveyor, that he is usually pretty well interested in who is interested in the defect, and it is inconceivable to me that the marine surveyor wouldn't scrutinize the chief engineer rather strictly on an occasion like this, but I will hear Mr. Hokanson in any further statement he may wish to make. [1118]

Mr. Hokanson: Just this further observation: the vessel was not under way during this observation; therefore, the chief engineer was not subjected to the test that any man in charge would be on a vessel under way. He stated here that he was there at the dock trial. There is a vast difference, as Your Honor well knows, between operating under way at sea and merely undergoing repairs in port.

The Court: Does the question arise in a manner different from the way it has arisen in connection with other similar questions? There have been other objections like this to other questions, have there not? The Court has ruled in other similar situations.

(Deposition of Harry J. Summers.)

Mr. Hokanson: I believe Your Honor has overruled me before.

The Court: I believe it should be overruled. I will say to you that I do not imagine the Court would be swept off its feet by the power of the answer in this respect. I will just consider it for what it is worth as I will any other testimony. Try to have in mind the circumstance that this witness was not aboard very long and may not have observed this man very long.

"A. My opinion was that he was a good chief engineer, [1119] because he had an interest in the job. He came up in the shop to check the shaft in the lathe and observed all of the steps in the repairs, and seemed very interested indeed.

Q. From your experience and also from your observation of the chief engineer aboard the Tanker Urania, would you say that he was qualified to operate the engines of that vessel?

A. I would say that he was a good and competent engineer, yes.

Q. Would you say that this chief engineer was capable of and was actually discharging his responsibilities in connection with the maintenance and efficient operation of the main engine?

Mr. Hokanson: I shall object to the form of the question because it does not incorporate the facts

(Deposition of Harry J. Summers.)
as to what the maintenance was that was conducted during the period of this witness' observations."

Mr. Hokanson: My objection, Your Honor, is set forth.

The Court: I would be a little more inclined to consider this. He may have been drunk at the time, I do not know, and the scope of the question covers some period of time before the day or days when the witness was observing the engineer, is that not true? [1120]

Mr. Hokanson: I believe my objection——

The Court: I believe this objection should be sustained. I do not see how he could know how he was performing his duties on some previous day. I think it is enough that he observed his competency to do the job.

"Q. (By Mr. Howard): Would you say the man was competent to handle his responsibilities as chief engineer?"

Mr. Hokanson: I object to that as repetitious.

The Court: Overruled.

(Deposition of Harry J. Summers.)

"A. I would say so, yes.

Q. Now, Mr. Summers, will you please state your opinion from your experience and from your actual inspection and your observations aboard the vessel, as to the nature of the breakdown of the main engine on the Tanker Urania as it appeared at the time of its arrival—the arrival of the vessel at Long Beach on November 11, 1948?

A. What do you want me to say other than what I have already specified in this written report (referring to [1121] document marked Claimant's and Cross-Libelant's Exhibit Y for identification)?

(Discussion by counsel and witness off the record.)

Q. You may refer to your survey report, which is now identified as Claimant's and Cross-Libelant's Exhibit Y for identification, in answering the question that I propounded to you, and if possible I would like to have you amplify the remarks you made in that written report?

A. Now, may I have that question again, please?

(The pending question was read by the reporter.)

A. In answering that—you specified the arrival. We didn't do too much about it upon arrival, but as the examination progressed and we began to develop evidence enough to form an opinion. I would say that the gear failure was the primary cause of the failure of the operation of the propeller machinery; and now we have to perhaps theorize or we have to

(Deposition of Harry J. Summers.)

express an opinion, which is merely an opinion, because there are so many sides to it, and we may or may not be correct in the opinion.

However, my opinion is that the failure of these gears was due to lack of proper lubrication."

Mr. Hokanson: That is objected to as not responsive.

Mr. Howard: I take that up in the next question. I have no objection to having that part stricken.

The Court: The last two lines of the answer are stricken.

"Q. I am sorry to interrupt you, Mr. Summers, but my question only inquired as to the nature of the breakdown that you found after the arrival of the vessel at Long Beach. I intend to ask you as to your opinion as to the cause of the breakdown, but in this question I am merely inquiring as to what your opinion was from your examination as to the nature of the difficulty.

A. Entire failure of the gears, period.

Q. Can you identify those gears?

A. The helical gears of the vertical shaft.

Q. Now, Mr. Summers, referring to the same time of the inspection that you made aboard the Tanker Urania after its arrival at Long Beach and the conditions that you found as a result of your

(Deposition of Harry J. Summers.)

survey of the main engine, and keeping in mind your previous answer as to the nature of the breakdown that you state was found; will you kindly state your opinion as to the cause of the breakdown or the failure and the damage or destruction of the helical gears of the vertical shaft?

A. In my opinion the gears failed because of faulty [1123] lubrication rather than misalignment. There are two causes in my opinion that contribute to this failure; in fact there is even a third cause, and that is metallurgy. But in this case it is my opinion that the gears failed because of faulty lubrication.

Q. Can you state, please, what factors entered into the opinion which you have given as to the cause of the breakdown that you have just expressed?

A. From my observation, I would say that the lubricating oil was contaminated because of leakage in the heat exchangers of the lubricating oil coolers. You wouldn't have to get very much salt water in the oil to make it so that it isn't a very effective lubricant.

Q. You have previously stated, Mr. Summers, and your report which is now identified as Claimant's and Cross-Libelant's Exhibit Y herein shows, that a leak was found in the No. 2 cylinder, which was repaired. Will you please state whether such a leak would in your opinion have been a cause or contributing cause of the breakdown of the main engine which we have heretofore described?

(Deposition of Harry J. Summers.)

A. Well, any leak that would add water to the lubricating oil system would contribute to the contamination of the oil.

Q. Where did the water developed in the leak of No. 2 cylinder drain to? [1124]

A. This was along the fuel oil. Have you got a diagram of that engine here?

Q. I am sorry, we haven't got one with us. It was used as an exhibit and it is up at Oakland now.

A. I think you had better get that stuff from the engine manufacturer—someone who is competent to pass on that. I just visualize the thing as the picture comes to my mind. There are so many different types of engines.

Q. After the repairs had been made on the main engine at Long Beach in November, 1948, and the trials had been conducted, did you then consider the engine to be in a satisfactory condition for the vessel to proceed on her voyage?

A. Yes, and I so stated.

Mr. Howard: That is all. You may cross-examine.

Cross-Examination

By Mr. Hokanson:

Q. Mr. Summers, your survey report which is marked now Claimant's and Cross-Libelant's Exhibit Y for identification contains conclusions based upon information you received from other persons, does it not?

(Deposition of Harry J. Summers.)

A. It does not as far as the—What point are you building up there? Which paragraph or which statement do you refer to, please?

Q. Well, let's take, for example, paragraph 4, where you state, "Serious leaks found in lubricating oil coolers [1125] and in fresh water coolers, which were dirty and clogged up."

A. Well, my statement with regard to that was, I told you I didn't see this under pressure, but after one of those coolers was taken out I did see it and noticed that the top had started to leak and—well, it was broken away sufficiently to be leaking.

Q. Do you remember which cooler——

A. It was a lubricating oil cooler that I have reference to.

Q. And you say you examined it?

A. I just saw it as the fellow was carrying it out, and I stopped him and said, "Let me see that," and I took a look at it, and the fellow went on with it and carried it on out.

Q. Could you see any breaks or cracks or any indication of leak when you examined it?

A. The point that the boy pointed out to me which was leaking—it was one of these tubes, and they looked like—the place he pointed out looked like it was patched and would have reason for leakage.

Q. I suppose you were looking at the lubricating oil side. A. The outside.

Q. A cross-section of the lubricating oil side?

(Deposition of Harry J. Summers.)

A. That is right. [1126]

Q. You say the boy pointed out to you this fact. Who do you mean by that?

A. Well, one of the men that was carrying one of the coolers; one of the Union Diesel Engine Company men who removed it.

Q. Well, did you look at both sides of the cooler?

A. No.

Q. Which side did you look at?

A. Just the outside. It was apparent when they were carrying it out.

Q. Well, Mr. Summers, is it not true that there are two sides that may be looked into; one side is the one to which the salt water flows and the other side is the one to which the lubricating oil flows; now, which side did you look through?

A. The lubricating oil side.

Q. And that is the only side you looked into?

A. That is right.

Q. And you observe here in your report that the coolers were dirty and clogged up.

A. That was simply told to me. I didn't see too much of it.

Q. You didn't see the dirt—you didn't see that it was clogged up?

A. No, I didn't see where it was clogged up, except [1127] that that was reported to me.

Q. Who reported it to you?

A. In a conversation with the Diesel Engine

(Deposition of Harry J. Summers.)

man, as I remember it, and then with Pike—he was in on that, too.

Q. Then again you say, "Main engine crankshaft and thrust bearing were checked for alignment and found satisfactory." You didn't make that actual test yourself, did you?

A. I was aboard ship when it was being done. I didn't handle the instruments, but I was down there.

(Discussion by counsel off the record.)

Q. (By Mr. Hokanson): Mr. Summers, I notice in paragraph 5 of your report, which, as I said, has heretofore been marked as Claimant's and Cross-Libelant's Exhibit Y for identification, that you say at the end that faulty lubrication contributed to the failure of the gears——

Do you mean by that that it was one of several contributing factors?

A. Well, just remember, sir—I say contribute to the failure of the gears, because—Of course, when this report was written, we had no idea the thing was going to be brought up for scrutiny, such as this is going through in a legal manner—And so the language of the surveyor must be so as not to get himself too fouled up with other experts—but in my opinion, off or on the record, it is that faulty lubrication was what destroyed the gears. [1128]

Q. In your answer to one of Mr. Howard's questions you said that you—this was a matter of theory only, and at that point I believe he directed

(Deposition of Harry J. Summers.)

your attention to the fact that he asked you only as to the nature of the breakdown. Now you have something further to say about the theory here?

A. Oh, I think what I had in mind was with regard to the cutting of the gears. You know, somebody might theorize that faulty lubrication would make a very uniform wearing of the gears, if you please, and then again you would say that if it was irregular that it might possibly be due to misalignment and you would say that that was a contributing cause; but in my opinion without misalignment you can still have irregular cutting of gear surfaces due to faulty lubrication, if you please, or no lubrication, all due to the metallurgy of construction.

Q. Any one of those might cause it?

A. Yes.

Q. And also overloading of the gears the binds—would that cause it? A. What?

Q. By some bind in the system—say a tight bearing or a valve sticking, or something of that character. A. And irregular load?

Q. Yes.

A. Well, gears should be designed to carry all loads [1129] with a certain safety factor, both top and bottom, and my thought that I am trying to get over is that an uneven wear of gears does not necessarily specify misalignment. That is just an opinion of an old engineer and an observer—that is all.

(Deposition of Harry J. Summers.)

Q. Now, if the gears were carrying more than they were designed to carry by reason of some extra burden on the engine——

A. It might give shaft deflection.

Q. Might it also cause galling?

A. Anything that may contribute to deflection might contribute to galling, I would say.

Q. Could you determine, when you found the gears badly galled as they were, according to your testimony, when they are still on the shaft—could you determine whether there was actual misalignment or proper alignment in those gears?

A. No, I don't think you could tell while they were on the shaft, because, if you are going to check misalignment, that is a misalignment of bearings—not the gear fit. I would say that to develop misalignment you have got to have misalignment of shaft or bearing or something to cut these things, or you wouldn't find anything wrong with the bearings or the shaft.

Q. If you had a bend in the shaft—could that cause misalignment or galling?

A. I would say if the shaft was bent so that it deflected [1130] the position of the gear that that could cause it, yes.

Q. Well, once you start a galling, it increases as it gets out of line? A. Yes.

Q. You start a chain of events and it keeps aggravating itself?

A. It gradually gets worse, of course.

(Deposition of Harry J. Summers.)

Q. Now, in your opinion, could mistiming of the engine to the effect that the pistons were hitting the valves create just the additional burden in thrust or stress on the gears as to cause the galling?

A. You are getting into a very technical situation here—the timing of firing.

Q. Yes?

A. In my opinion, the timing of the firing would only be out of time and out of adjustment after these gears became defective and worn.

Q. Assuming, Mr. Summers, that after new gears had been installed and the timing of the engine had been completed——

A. Readjusted——

Q. ——readjusted, so that the engine was run full ahead and the timing was off to the extent that the pistons were hitting the valves, could that cause, in your opinion, such distortion or weight on the timing gears as to cause galling? [1131]

A. If your engine is out of step, so to speak, that means your fuel economy or your whole engineering cycle is wrecked, so far as I could say. I don't get the point—That timing shaft would have to be completely out of—because of such a situation as that—it would have to be completely out of line and out of step and just in bad order, I would say.

Q. Mr. Summers, how long would it take, under normal circumstances, to retime an engine of the type that the Tanker Urania had?

(Deposition of Harry J. Summers.)

A. You mean from inception, to fix the thing and start from scratch and set it up? You want to know how long it would take to do that?

Q. Yes.

A. Well, that is a Union Diesel engine, and I am not exactly familiar with the adjustments of all of these systems—To say how long it would take a mechanic,—well, in the first place, if you had a good mechanic who understood the engine, he could probably do it in one-fourth the time of the poor engineer that had to go along and pick it out by trial and error.

Q. In terms of hours, do you have any opinion as to how long the timing should take?

A. This particular engine—I have no right to make an estimate, because I just simply don't know. I had [1132] possibly better not say because I just don't know.

Q. Should it take more than one day?

A. Oh, well, just as an opinion from a man not too thoroughly familiar with it, I would say that one day would be plenty of time—adequate time.

Q. Now, Mr. Summers, assuming that the timing gears wore out on this vessel and new gears were installed, and that three days were consumed in timing the engine; that after the timing was completed the engine was run full ahead, and the pistons were hitting the valves and the engine acting erratically; what is your opinion as to the competency of the persons who conducted the timing of the engine?

(Deposition of Harry J. Summers.)

(Discussion by counsel and witness off the record.)

Mr. Howard: Let us have the question. Mr. Reporter, will you read the question?

(The pending question was read by the reporter.)

Mr. Howard: Do you understand the question, Mr. Summers, and does the question have in it the necessary assumptions upon which you can base an intelligent answer?

The Witness: Well, after all, Mr. Howard, I am just a marine surveyor; I am not a Union Diesel Engine installing engineer, so if I answer that question it might have sort of a ridiculous aspect. You are putting me on a technical spot that I don't know much about. [1133]

Q. (By Mr. Hokanson): Do you have any opinion?

A. I would rather not express it, if I may be excused from so expressing it.

Q. But you have an opinion, do you not?

(No answer by the witness.)

Mr. Howard: The witness has stated that he doesn't care to express an opinion, and I don't believe we ought to ask him to go any further on that.

The Witness: Well, I have a theory built up on opinion, but I don't think it should be considered as actual fact. I still don't care to express it."

(Deposition of Harry J. Summers.)

Mr. Howard: The question was never answered, was it?

Mr. Hokanson: "Well, I have a theory built up on opinion, but I don't think it should be considered as actual fact. I still don't care to express it" is what the witness says.

"Q. (By Mr. Hokanson): Mr. Summers, have you ever heard of any reliable or competent engineer timing a Diesel engine by jacking it over by hand and adopting the usual mechanisms involved in timing, and when he finished the job he then ran the engine full ahead and the pistons were hitting the valves——

A. No, I would say I never heard of such a thing.

Q. Speaking of your observation of the engineer, the chief engineer on the Tanker Urania, you stated that your opinion as to his competency was based merely on the interest he showed in what was being done in respect to the repairs.

A. That is correct.

Q. You also stated, didn't you, that after you had made certain preliminary inspections you thought you had got to the bottom of the cause of the damage and didn't pursue a further analysis, in contemplation that the issue of the cause of that damage might be litigated?

A. That is right—that is right.

Q. So that you could have made a much more thorough examination of the engine had you known

(Deposition of Harry J. Summers.)

that the question of the basic cause was to be litigated? A. That is correct.

Q. Now, from your examination of this engine and from what you have learned about its construction, could you say whether it would be necessary to renew the governor cross-head and do certain additional work on the governor as the result of the gears having been galled?

A. I took the renewal of the governor cross-head as a recommendation of the engine builders, who were supposed to know their engines, and not on any observations of my own.

Q. In other words, you couldn't say whether the removal of those parts is related to the galling of the gears? [1135]

A. Not on the governor.

Q. You mentioned that you looked at the spur gears on the crankshaft, and that they were all right. What gears were those?

A. Those were that chain of gears on the crankshaft, and then the idling gears next to that, and then there is a third set of gears after that—next to that—there is just a string of plain gears—the gears that I examined were all right.

Q. Were those steel gears? A. Yes.

Q. And what do they do?

A. They transmit the power from the crankshaft to the vertical shaft—and there was nothing the matter with those gears, and so we didn't go into them too much.

(Deposition of Harry J. Summers.)

Q. Did they connect with the helical timing gears? A. Through a shaft.

Q. Do they carry the same load as the vertical timing gears?

A. If they are in the system, I would say so.

Q. Well, they are lubricated by the same system? A. Yes.

Q. And you state that there was nothing wrong with them? A. Practically nothing.

Q. No galling? [1136]

A. No; nothing that I saw wrong with those gears that would cause me to investigate them further.

Q. Now, the main gears—some of them were examined and found to be all right; is that correct?

A. Yes, they were examined. I didn't personally get in the crankcase and check up on the main bearings, but they were considered all right.

Q. And the helical timing gears which were galled—they are of very heavy construction, are they not?

A. Yes; pretty rigid and pretty rugged construction.

Q. And how wide a space do they have, approximately?

A. Three and a half or four inches would be my guess.

Q. Now, assuming, Mr. Summers, that you have all your main and crank bearings and your cam system lubricated by the same oil, and assuming

(Deposition of Harry J. Summers.)

that all the bearings were found to be in good order, including the spur gears, excepting, however, the timing gears—in your opinion could the faulty lubrication wear or gall the timing gears only without affecting the other parts? A. Yes.

Q. Have you ever seen that condition obtain in any other engine?

A. I cannot give you a specific case, but the action of the helical gears—that is different from your straight gear assembly—— [1137]

Q. Isn't it true, Mr. Summers, that the babbitt bearings which are your main and crankshaft bearings, carry the main thrust or weight of the engine?

A. Oh, yes, your main bearings, sure, they carry the big load.

Q. Well, isn't it true that babbitt is a much softer and more susceptible of wiping out than case hardened steel?"

Mr. Howard: I will waive my objection.

"The Witness: You want me to answer now whether the babbitt metal is softer than the steel in the shaft, etc.?

Mr. Hokanson: I think the question should be read back.

Mr. Howard: Yes.

(The pending question was read by the reporter.)

(Deposition of Harry J. Summers.)

A. It is more susceptible to wiping out because your case hardened steel would not wipe out; it would crumble and fall apart.

Q. If there was ordinary lubrication to the helical timing gears and they were in perfect alignment, they should operate for some time without wearing out, shouldn't they?

A. Yes, faulty lubrication should cause a galling or a spalling of the teeth in the helical gears and the [1138] continued spalling and the continued grinding would serve to destroy those gears in a comparatively short length of time after the first failure of any one tooth; that would be my opinion. After all, these things are locked up in a gear case. There are no examination glass windows through which you can look and see what happens.

Q. Do you know what the capacity of the lubricating oil system was on the Tanker Urania?

A. You mean gallons? That is, just the lubricating oil system—what number of gallons would it take?

Q. Yes. A. No, I didn't take that down.

Q. Mr. Summers, I am handing you what has been previously marked by the reporter for identification as Claimant's and Cross-Libelant's Exhibit S (handing document to the witness).

A. Yes.

Q. I will ask you to read on this exhibit the analysis of the oil shown thereon, and tell me whether in your opinion that oil would be of suffi-

(Deposition of Harry J. Summers.)

cient viscosity to lubricate properly the main engine of the Tanker Urania.

Mr. Howard: Now, I am going to ask the witness to read the entire exhibit before answering the question, because I would like to ask him a question when he has read it.

Have you read the exhibit in its entirety, Mr. Summers? [1139]

The Witness: Yes, I have.

Mr. Howard: Have you ever seen that document before?

The Witness: No.

Mr. Howard: Did you have anything to do with its preparation?

The Witness: No.

Mr. Howard: Do you know the gentleman whose name appears at the bottom of the document?

A. I do not.

Mr. Howard: Did you request such a report to be made?

The Witness: No.

Mr. Howard: That is all. You may continue.

Q. (By Mr. Hokanson): Are you prepared to answer my question now, Mr. Summers?

A. In regard to this (indicating document)?

Q. Yes.

A. Your question is, Does the——"

Mr. Hokanson: May it please the Court, do you know what document is referred to here?

(Deposition of Harry J. Summers.)

The Court: I have seen the exhibit. The document, other than that one clause excepted by the Court, has been received in evidence as Respondent's Exhibit A-20.

Mr. Hokanson: It is my understanding that Your [1140] Honor has not yet admitted that document and had asked for further authority on it. That is the oil analysis report.

The Court: The exhibit has on it the notation by the clerk that it has been received in evidence. "The above sample represents oil scooped from botton of the crank chamber and probably was contaminated by accumulation of rust brought about by water leaking into the oil system."—my recollection is that the Court excluded from admission into evidence that statement. The document is otherwise before the Court.

"Mr. Howard: Would you like to have the question read back to you?

The Witness: Yes, I think so.

(The question at page 233, line 20, was read by the reporter.)

A. The origin of this specimen is very vague—I don't know——

Mr. Hokanson: May I interrupt, Mr. Summers?

The Witness: Yes.

Q. If you can answer my question without taking into account the source of the specimen which

(Deposition of Harry J. Summers.)

is analyzed there, I would appreciate your answering my question, just assuming [1141] for the purposes of the deposition that this oil was in the Tanker Urania.

A. I would say, just as an opinion, not as an oil expert, you know, that an oil of this viscosity would be adequate to lubricate the main engine.

Q. Thank you. Now, do you believe that the camshaft of this engine required substantially constant driving force to rotate it?

A. Constant driving force?

Q. Yes.

A. Yes, I would say constant driving force to rotate it.

Q. That being the case, would you expect excessive wear would be rather evenly distributed on the gears?

A. On the damaged gears?

Q. Yes.

A. I would expect uniform wear until the first galling or the first damage on some certain tooth.

Q. So that if an extraneous object got into the gears and chipped a tooth, do you think that in the chain of events that would cause galling of an irregular character?

A. That seems reasonable; some piece of some metal in there would start a chain of events.

Q. Now, Mr. Summers, did you check the alignment and thrust of the casmshaft other than check the camshaft personally so that you wouldn't

(Deposition of Harry J. Summers.)

know whether the camshaft [1142] bearings were checked for bind?

A. May I say something here just off the record——

Mr. Howard: It is all right with me.

Mr. Hokanson: Well,——

(Discussion by counsel and witness off the record.)

The Witness: I did not check the camshaft; that was the last question?

Q. You wouldn't know, then, whether the camshaft bearings were checked for bind or not, would you? A. I do not know that.

Q. Mr. Summers, would it be good engineering practice, in your opinion, to adopt the following procedure: Assuming that the helical timing gears have been galled and worn; assume that it is also discovered that the oil is dirty and of a color which would make the oil suspected as a lubricating agent; assuming that the oil was then changed and new oil put in; assuming then that the gears were replaced and the engine run, without making a check to determine the source or cause of the bad oil which was removed——

A. The gears have started to gall, you say?

Q. Yes, the gears have already been galled, requiring replacement."

(Deposition of Harry J. Summers.)

Mr. Howard: I will now enter an objection to the [1143] question on the basis of it containing an assumption that the oil was discovered dirty and of a color which would make the oil suspected as a lubricating agent, which I submit is not a matter of record from the evidence that has been submitted in this case to date.

Mr. Hokanson: May it please the Court, the theory upon which the cross-libelant proceeds here is that the oil was contaminated by the infiltration of salt water through leaking coolers.

The record shows by the chief engineer's deposition that upon the first breakdown he removed the oil. The record then shows new gears were installed. I submit, Your Honor, that there is an inference from the evidence already in the record and from evidence that will hereafter be called to the Court's attention that the fact of the condition of that oil, if the oil was the basic cause, was then known to the parties effecting the repairs.

The Court: I understand Mr. Howard to object specifically to this sentence in the supposititious question: "assume that it is also discovered that the oil is dirty and of a color which would make the oil suspected as a lubricating agent." Is that the line to which you object?

Mr. Howard: That is the line I am referring to. [1144]

The Court: What is the evidence that justifies the statement of that condition in this question?

(Deposition of Harry J. Summers.)

Mr. Hokanson: May I ask Mr. White to read from the chief engineer's deposition?

Mr. White: For Your Honor's information, reading from the deposition of the chief engineer Baxevanis, which has already been read in evidence; on page 106 is the best indication of it.

"Q. What do you think would have happened if you had operated it with iron filings in the lubricating oil?

A. I would have ruined the engine, that is the filings, the iron filings, would have ruined the filter, etc., and of course when there was no lubrication the parts would become more worn out. There was oil, but it was dirty and full of iron filings?

Q. Had you changed the oil at Manzanillo?

The Court: Is he stating a fact there when he makes that statement, that the oil was dirty and had iron filings in it?

Mr. White: Yes, Your Honor. "There was oil, but it was dirty and full of iron filings."

The Court: What about the color of the oil? Do you know where that evidence in the record is, the color of the oil which made it suspect as a lubricating agent?

Mr. Hokanson: Mr. S. W. Newell, vice president of [1145] The Union Diesel Engine Company, in his deposition stated that in his conversations with Mr. Cross, they discussed the oil and concluded that the oil was at fault. He states that that

(Deposition of Harry J. Summers.)

conversation was had when Mr. Cross was at Manzanillo.

Mr. Cross' testimony is not entirely consistent. He states he found the color of the oil to be brown after the second breakdown, but there is evidence in the record which would lead—at least, it is of sufficient evidentiary weight to draw an inference that the fact of the color of the oil was known to the parties involved in the repairs.

The Court: That is not stating the fact, as you do in this assumed condition, that the oil is of a color which would make it suspect as a lubricating agent. You stated in effect that the color of the oil made it suspicious.

Mr. Hokanson: Both Mr. Cross and Mr. Newell——

The Court: Did either one of them call it brown in color?

Mr. Hokanson: Both of them called it brown in their testimony.

Mr. Howard: Yes, Your Honor, but it is my recollection that that testimony related to a conversation between Mr. Cross and Mr. Newell by radiophone after the [1146] ship had left Manzanillo and was at sea and probably after the second breakdown. Furthermore, this question here must relate to the time of the first breakdown there when the gears were replaced at Manzanillo, because he goes on with the assumption that the gears were replaced. There was no replacement of the

(Deposition of Harry J. Summers.)

gears at sea after the second breakdown, so we must tie this in with circumstances existing at Manzanillo.

The chief engineer said at page 106, "There was oil but it was dirty and full of iron filings," which, it seems to me, is entirely separate from the condition that the oil was dirty and of a color which would make the oil suspected as a lubricating agent, because the gears had been galled and obviously there were iron filings in the oil as a result of the galling of the gears.

The Court: Didn't someone comment upon the color of the oil, in effect, that it was of a color that indicated it had some kind of water in it?

Mr. Howard: Yes, Your Honor, and Mr. Newell, as I recall his testimony, said he advised Cross on the radiophone to dump the oil and change it.

The Court: Do you remember what he said about color in that connection? Didn't he say something about a brown color? [1147]

Mr. Howard: There was reference to that, but as I recall, that was after departure from Manzanillo, after the vessel was at sea en route to Los Angeles.

I have one place that I can refer the Court to now in Mr. Cross' deposition, reading from the bottom of page 50, line 25:

"Q. Mr. Newell testified that you discussed the possible causes of the galling of these gears and stated that you had determined that the oil was

(Deposition of Harry J. Summers.)

brown and you both concluded that would be caused by water, do you remember that conversation?

A. Yes, that was after I left Manzanillo, after the second breakdown.

Q. When did you leave Manzanillo?

A. Approximately five p.m., November 3rd."

Mr. Hokanson: I will not insist upon the point, your Honor. I think that the question embraces certain assumptions which are in the record, and if counsel feels that the inclusion of the words "brown oil" is sufficient to disqualify the answer, I am willing to withdraw the question to settle the controversy.

The Court: The question and answer are withdrawn.

Mr. Howard: I believe, counsel, that would extend to the following question on page 237.

Mr. Hokanson: Your Honor, I do not agree. I think [1148] the next question at line 17 is perfectly proper, notwithstanding Mr. Howard's contention that Mr. Cross discovered the condition after——

The Court: I think it should start at line 17, because the answer depends upon the statements in some preceding question, is that not true?

Mr. Hokanson: Yes.

The Court: You may begin reading at line 17, page 237.

Q. Well, if the oil is dirty or in appearance contaminated, there are certain obvious sources to look for as the cause; isn't that right?

(Deposition of Harry J. Summers.)

A. Yes; if you have contaminated oil, you have got to determine the cause of the contamination and correct it.

Q. Well, you wouldn't be correcting a suspected fault by merely replacing the gears that were worn out, if you didn't check the cause of the contamination of the oil itself; isn't that right?"

Mr. Howard: My objection runs to that question, if the Court please, referring back to the objection to the question on page 236. We are referring now to a [1149] time when the gears were replaced, and that has to be at Manzanillo or Long Beach.

Mr. Hokanson: Your Honor will recall that the chief engineer in his deposition stated that the oil was dirty and that he changed it in Manzanillo. Mr. Cross came aboard and the oil had already been flushed out.

The Court: That does not respond to the point made by Mr. Howard in his last statement, that that question involves the one that has been ruled out.

Mr. Hokanson: I submit the chief engineer was put on notice if he said the oil was dirty when he removed it at Manzanillo.

The Court: Does the witness who had to answer the question at line 23 have to have in mind the conditions which have been objected to and sustained in regard to the previous question?

Mr. Hokanson: I submit he does not.

The Court: I am inclined to agree. I believe

(Deposition of Harry J. Summers.)

this is independent. The objection is overruled. Read the answer at the top of page 238.

Mr. Howard: May it be understood that my objection continues as to the subsequent questions dealing with the same subject?

The Court: Does opposing counsel so agree?

Mr. Hokanson: I agree, your Honor.

The Court: It is approved by the Court.

"A. That is right, yes.

Q. Now, would it also be good practice, in your opinion, assuming the facts that we have already assumed in the previous question and answer, to run additional lube lines to the gears that were galled?

A. What was this with respect to the lube lines; with regard to all of the other conditions you want to ask my opinion about? Well, in my opinion, those lines were run because they felt that the gears were not getting sufficient lubrication, and so the additional lines were installed so as to eliminate that possibility.

Q. Assuming it was known to the person who installed the additional lubricating lines that the oil that had just been removed was contaminated, would putting in additional lines to these gears help the specific cause of the galling?

A. Not unless he changed the oil. If the oil was bad, it just isn't good lubrication.

Q. Well, assuming that the oil was changed, but that the cause of the contamination of the removed oil had not been looked into, would it be good prac-

(Deposition of Harry J. Summers.)

tice to put in additional lines to these gears? [1151]

A. An engineer would do that, feeling that a localized condition existed, and that they might have continued to have trouble and he was trying to create insurance against that.

Q. In other words, it would be possible to have a clogging in some of the lines to these gears; is that correct?

A. If I get what you mean—any line can become clogged from some source or other, but this man probably said there wasn't adequate oil coming to those gears and he assumed that the best way would be to put in the lines so as to be very sure that sufficient oil would go to the proper places through the gears.

Q. Mr. Summers, if each of the lubricating lines leading to these gears had been clogged up, could that cause a galling of these gears?

A. Yes—lack of oil would.

Q. In other words, lack of oil or starvation of lubrication at that point could just as likely have been the cause as any other cause that has been suggested in your testimony?

A. Yes, lack of oil or lack of lubrication is just the same as lubrication with oil with water in it.

Q. Did you note the appearance of the engine apart from the inspection of the interior parts?

A. Of the specific involved parts, do you mean?

Q. Yes. [1152]

A. Well, of course, the main engine as it ap-

(Deposition of Harry J. Summers.)

peared to me looked like any other engine which was partially torn down and was up for examination and all of that.

Q. Did you make an examination of the air, lube, and water lines?

A. No, I didn't make such an examination.

Q. Or of the tubing I have referred to?

A. No, the tubing gets out of full view, but what I saw was all right, but I didn't trace any lines to see about this and that.

Q. Well, did you notice or did you check the lines or the tubing which led to the vertical timing gears which were galled, that is, the lubricating oil lines on the original system? A. No.

Mr. Hokanson: That is all.

(Discussion by counsel off the record.)

Redirect Examination

By Mr. Howard:

Q. Did the fact that there were service representatives and other representatives of the engine manufacturer present at the time of your inspection have any bearing on your report?

A. No.

Mr. Hokanson: I shall object to the question as not [1153] being within the scope of redirect examination.

Mr. Howard: He testified on cross-examination that the representatives of the engine manufacturer were present."

The Court: The objection is overruled.

(Deposition of Harry J. Summers.)

"Q. Were you relying upon them to any extent, that is, the representatives of the engine manufacturer, to determine the extent of the repairs necessary to the main engine?

A. No. We just simply saw that the involved parts, that is, the damaged parts were being replaced and that the defective heat exchanger system was corrected—the cooling system was being corrected. And with renewed parts and correct lubrication, we felt that the job was adequate with which to proceed to seat.

Q. Now, these timing gears that you have been describing—were they of the same design and engineering principle as these other gears that you have been talking about in connection with the question as to whether you found similar damage or galling on the other gears; were the timing gears of the same design?

A. Yes, the first set of gears and the second set of gears appeared to have parallel damage. [1154]

Q. In the vertical shaft? A. Yes.

Q. But when speaking of other gears in the engine that did not sustain this damage—were they helical gears?

A. No, they were straight gears.

Q. They operated on a different engineering principle, did they? A. Yes.

Q. Would that have any effect on the amount of pressure or weight of the bearings that was carried by those gears?

A. Well, in my opinion, I think it is generally

(Deposition of Harry J. Summers.)

conceded that a helical gear has one difference: opportunity for a grinding motion in the helical gears that would not obtain in a straight spur gear. There is an additional frictional proposition there.

Q. What is the customary method of determining the grade of lubricating oil used?

Mr. Hokanson: If you know.

A. Well, the engineers who design an engine with a train of gears and with certain bearings—they have to determine together with the lubricating engineers the type of oil that is required for the lubrication of the engine. That is a very highly specialized thing which is developed by the manufacturers of the engine.

Q. Did you look at the manufacturer's manual to find [1155] out what really was planned to be used?

A. To the manual, yes; that is what we would ordinarily look to.

Mr. Howard: That is all.

Recross Examination

By Mr. Hokanson:

Q. Aren't helical gears more efficient than spur gears?

A. Now, you are getting into the gear man's province. Helical gears, in my opinion, are designed to fit certain situations, and the way this engine is set up the designer found that helical gears were essential and more simplified as a medium for power to the camshaft.

Does that answer your question?

(Deposition of Harry J. Summers.)

Q. No, it doesn't. My question was, Aren't helical gears, by virtue of the nature and design, more efficient than spur gears?

A. They certain would be to transfer power around an angle the way they do it.

Mr. Hokanson: I have no further questions.

Redirect Examination

By Mr. Howard:

Q. Mr. Summers, are you related to the Mr. Summers of Merrit,, Summers & Bucey, attorneys, of Seattle, Washington? A. No, I am not.

Mr. Howard: That is all. [1156]

Mr. Hokanson: Nothing further from this witness."

Mr. Howard: That concludes the deposition of Mr. Harry Summers, which I offer in evidence as a part of cross libelant's case in chief.

The Court: It is so received.

Mr. Howard: Your Honor, I am going to reserve my offer on these last several exhibits until we can do a little research this evening.

The Court: I wish both of you would do some research on the general admissibility of marine surveyor's reports. If you have some such reference to the general law, where it can be picked up, I think I would like that now.

Mr. Howard: We found one reference in Corpus Juris, I am not satisfied it is the only one. Volume II, under Admiralty, Section 139 at p. 263.

The Court: Is it C.J.S.?

Mr. Howard: Yes, your Honor. Particularly under footnote 49.

The Court: What is the Hough decision?

Mr. Le Gros: Rogers and Learned Hand, the three of them were on that case. There is an earlier case, in 1934. [1157]

The Court: You are not responding to my question about the Hough decision.

Mr. Legros: He is looking it up now. I will give you an earlier case: City of Chester, 39 Federal Reporter p. 429.

The Court: That is quite ancient.

Mr. Legros: That is the one Judge Hough used as a basis. 249 F. 718, the Hough decision.

The Court: Court is adjourned until tomorrow morning at 9:30.

(At 4:55 o'clock p.m., Wednesday, April 13, 1949, proceedings adjourned until 9:30 o'clock a.m., Thursday, April 14, 1949.) [1158]

April 14, 1949—9:30 o'clock a.m.

Mr. Howard: We have agreed with counsel for the libelant on a stipulation which will serve to limit some proof here, which we would like to announce to the Court at this time.

This is with reference to the damages claimed by the cross libelant and refers to expenditures at Los Angeles. The stipulation we propose is agreeable to all counsel. The vouchers have not yet been marked.

Let it be stipulated that Exhibit A-24, consisting of invoices and vouchers for disbursements at Los Angeles in the total sum of $1409.89 represents items and services purchased and furnished to the tanker Urania during November, 1948; that the cost in the case of each item is reasonable, and each of said invoices has been paid by or on behalf of the claimant shipowner and may be offered and admitted in evidence in this case.

It is further stipulated, however, that nothing is conceded by cross respondent with respect to the necessity of the items represented by the invoices and vouchers herein, nor their relationship to claims of cross libelant. [1159]

If the Court please, with respect to these vouchers, which I ask the clerk to now mark as Respondent's Exhibit A-24, we have not yet had an opportunity to remove several vouchers which by agreement have been eliminated. May it be stipulated that we will remove those at the first opportunity at the recess so as to reduce the vouchers to the total of $1409.89 as indicated in the stipulation?

Mr. Hokanson: It may be so stipulated.

(Invoices marked Respondent's Exhibit A-24 for Identification.)

Mr. Howard: I would next like to have the clerk mark the Pacific Towboat & Salvage Company invoices.

(Towing invoices marked Respondent's Exhibit A-25 for Identification.)

The Court: Has A-24 been marked before this morning?

Mr. Howard: No, your Honor.

The Court: Have you offered A-24?

Mr. Howard: I was going to offer them all as a group when I complete the stipulation. The same stipulation, if the Court please, would apply to Identification A-25, being towing invoices for the services of the tug Pacfic Retriever in towing the vessel from a point off the West Coast of Mexico to [1160] Los Angeles in the adjusted total of $4118.

Counsel, as to that item may it be stipulated that Exhibit A-25 represents towage services purchased or furnished to the tanker Urania during November 1948, that the cost as to this item is reasonable, and said invoice has been paid by or on behalf of the claimant shipowner, and may be offered and admitted in evidence in this case? It is further stipulated, however, that nothing is conceded by cross respondent with respect to the necessity of the item represented by the invoices and vouchers herein, nor the relationship to claims of cross libelant.

Mr. Hokanson: It may be so stipulated.

Mr. Howard: At this time I will offer A-24 and A-25.

The Court: Do you wish to state your objection to each?

Mr. Hokanson: My objection is the general ob-

jection heretofore made, your Honor, that there has been no foundation laid for the relationship of these items to the work done by Commercial Ship Repair; and the continuing objection made earlier in the case with respect to the item of acceptance of the vessel by the cross libelant and the claim made thereafter.

The Court: Do you understand it? [1161]

Mr. Howard: I understand, if the Court please, but I believe that objection is contained in the body of the stipulation, that nothing is conceded with respect to the relationship of the——

The Court: But in order for the cross respondent to preserve his objection going to the merits, he should state it in the record, if it has not already been done.

Mr. Howard: I understand that subject to that continuing objection, counsel is agreeable to having these documents admitted in evidence?

Mr. Hokanson: That is correct.

The Court: The objection is overruled. Respondent's Exhibits A-24 and A-25 are admitted.

(Respondent's Exhibits A-24 and A-25 received in evidence.)

RESPONDENT'S EXHIBIT A-25

Invoice

Pacific Tow Boat & Salvage Company

Nov. 11, 1948

No. 914

To: M/S Urania and/or Owners,
c/o General Steamship Corp.
Berth 230 E,
Term. Island, Calif.

Services of Tug Pacific Retriever:

Towing M.S. Urania from 70 miles south of Cape San Lucas, Mexico, to Craig Shipbuilding Co., Long Beach, Calif.

Nov. 6th (8:30 AM) to Nov. 11th (1:00 PM) 1948—flat price $4286.00

No transportation tax from Mexican Waters.

/s/ ANDREAS BEIS,
Master.

[Rubber stamp]
Comp. O.K. M.K.
Appr'd RHH
Check No. 84894
Amount $4286.00
Charge to 120-60-1

Seen, noted and approved without prejudice, subject to adjustment.

BEST & COMPANY,
By /s/ FRANK G. NIVER,
Lloyd's Sub Agents,
Los Angeles, Calif.

[Stamped]: Paid Nov. 17, 1948.
/s/ F. A. GRUBER,
Pacific Towboat & Salvage Co.

Invoice

Pacific Tow Boat & Salvage Company

Mar. 11, 1948
No. 50

To: M/S Urania and/or Owners,
c/o General Steamship Corp.
Terminal Island, Calif.

Credit Memo

1680 gallons of Dark Diesel Fuel taken from M/S Urania $168.00

Invoice

Pacific Tow Boat & Salvage Company

Nov. 11, 1948
No. 914

To: M/S Urania and/or Owners,
c/o General Steamship Corp.
Berth 230 E,
Terminal Island, Calif.

Services of Tug Pacific Retriever:

Towing M/S Urania from 70 miles south of Cape San Lucas, Mexico, to Craigh Shipbuilding Yard, Long Beach, Calif.

Nov. 6th (8:30 AM) to Nov. 11th (1:00 PM)—flat price	$4286.00
Credit: 1680 gallons of Dark Diesel Fuel taken from M.S. Urania—at 10c	168.00
Total	$4118.00

Respondent's Exhibit A-25 admitted April 14, 1949.

Claimant's and Cross-Libelant's Exhibits Nos. U-1, U-3 and U-4 inclusive for identification March 24, 1949.

Mr. Howard: Next, if the Court please, as to Identification A-17, being a group of 13 pages of invoices of the Union Diesel Engine Company, counsel have agreed as to an adjustment in the amount of those invoices to eliminate certain items which by the testimony we concede are not in any way related to the claims of the cross libel in this case, which would reduce the total amount of those invoices to the sum of $4275.78.

With that reduction, which we will also undertake to make on the invoices with leave of the Court to eliminate those items in some way by

notation on the [1162] invoices to reduce the figure to that amount, I now offer Identification A-17.

Mr. Hokanson: In addition to the subject of the continuing objection made with respect to the merits of these items, I will object to the introduction of the exhibit at this time on the ground that the same is not admissible for the reason that the testimony has not established that all of the items therein contained were necessary or proper for the repair of the vessel Urania arising out of the breakdown which has heretofore been described by the testimony.

There is, I submit, Your Honor, testimony by witnesses called in behalf of the cross libelant who have disputed the necessity of many of those items —all of which I have not taken the time to analyze, Your Honor—but in a great many cases, there is considerable doubt with respect to whether proper proof has been shown as to the need for those items, and since the invoices are offered as a group, I object to their admissibility on that ground.

The Court: The objection is overruled. Respondent's Exhibit A-17 is now admitted.

(Respondent's Exhibit A-17 received in evidence.)

(Deposition of Sidney W. Newell.)

RESPONDENT'S EXHIBIT A-17

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 10/28/48
Contract No., Wire & Phone from N. Y.

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67389
Invoice Date, 10/28/48
Vendor's No., R-2777

Shipped to: M. V. Urania
Manzanillo, Mexico

Date Shipped, 10/28/48

From, Oakland, Calif.
F.O.B., Oakland, Calif.

Via, N. A. Cross (Air Plane Passenger)

Quantity		Description	Unit Price	Amount
Repair Parts for Diesel engine #42538—Model V6—560 H.P. in Boat Urania				
1	V6-1490	Vertical shaft drive gear		$120.00
1	V6-1403	Vertical shaft lower gear		97.50
1	V6-1452A	Vertical shaft base bearing bushing		4.00
2	V6-1486	Ball Bearing	18.10	36.20
2	M-581	Tubing elbow	.35	.70
2	M-583	Tubing union half	.28	.56
1	M-586	Tubing tee		.44
1	M-588	Tubing union		.25
1		Pc. tubing copper, ¼" x 12 feet		1.20
				$260.85

Net Weight, 82 lbs.

Declaramos que los datos y valores asignados a las mercancias mencionadas en esta factura, son los verdaderos y que procedemos con legalidad y buena fe.

We hereby certify that the above values and details are true and correct.

The Union Diesel Engine Company
By Geo. W. Emerson, Secretary.

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 10/28/48

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67394
Invoice date, 10/30/48
Vendor's No., R-2776

Date Shipped, 10/28/48

From, Oakland, Calif.
F.O.B., Oakland, Calif.

Description	Amount
a/c Engine #42538, V-6,560/6—Urania	
Paid a/c	
Airplane ticket to Mexico City	$136.91

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67459
Invoice Date, 11/12/48
Vendor's No., R-2776

a/c Engine #42538, V-6,560/6—Urania (YO-73)

2nd Progress Invoice

Description	Unit Price		Amount
Services, Engineer Cross from October 28 to November 11, both inclusive ..... 15 Days @	$30.00		$450.00
October 28, 1948:			
Local expenses, Engineer Cross:			
Taxi	1.00		
Bridge Tolls	.50		
Tourist Card	1.49		
Baggage Chgs. Plane	20.90		23.89
Expenses in Mexico:			
Oct. 29 Fare, Mexico City to Manzanillo, Mexico	$66.61		
Pullman	12.40		
Meals	10.00		
Taxi	25.00		
Baggage Charges	6.00		
Telephone	13.00		
Customs Charges	435.67		
Oct. 30 Meals	15.50		
Baggage	6.00		
Oct. 31 Meals	5.00		
Lodging	20.00		
Baggage	10.00		
Water Taxi	16.00	Exchange	
	641.18	@ $5.85	109.61

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67459
Invoice Date, 11/12/48
Vendor's No., R-2776

	Description	Unit Price	Amount
Phone calls by Mr. S. W. Newell at Los Angeles:			
Nov. 3	To M. V. Urania	$23.50	
Nov. 4	To General Steamship Company	.45	
Nov. 6	To M. V. Urania	7.35	
Nov. 7	To M. V. Urania	5.00	$ 36.30
Phone calls to Mr. S. W. Newell from Oakland:			
Oct. 27	To San Diego	2.28	
Oct. 28	To San Diego	2.28	
Nov. 8	To M. V. Urania	4.50	
Nov. 9	To General Steamship Company	2.30	11.36
			631.16
	Insurance		13.13
			$644.29

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.
Note: Other expenses and services on later billings.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67463
Invoice Date, 11/13/48
Vendor's No., R-2776

Shipped to: M. V. Urania and Owners
c/o Craig Shipbuilding Co.,
Long Beach, California

Date Shipped, 11/13/48 — From Oakland, Calif.

Via, Air Freight — F.O.B. Oakland, Calif.

	Description		Unit Price	Amount
	a/c Engine #42538, V-6,560/6—Urania			
1	V6-1005	Camshaft gear		$172.50
1	V6-1405	Vertical shaft gear		85.00
2 Set	V6-1455	Lower vertical shaft bearings @ $12.50		25.00
				$282.50

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67477
Invoice Date, 11/17/48
Vendor's No., R-2825

Shipped to: MV. Urania and Owners, c/o General Steamship Corp., Ltd., 365 West 7th St., San Pedro (Notify consignee on arrival)

Date Shipped, 11/17/48
Via, United Air Freight

From Oakland, Calif.
F.O.B. Oakland, Calif.

Item	Quantity	Description	Unit Price	Amount
		a/c Engine #42538, V-6,560/6—M. V. Urania (YO-73)		
1	2	V6-4494R—Fuel control sub rod end	@ $ 1.00	$ 2.00
2	12	V6-3574—Fulflo fuel oil filter elements only	2.00	24.00
3	2	SV6-2675—L. O. Manifold Branch pipe	6.25	12.50
4	12	V6-663G—Copper Gaskets	.06	.72
....	12	V6-665—Rubber Gaskets	.25	3.00
7	2	Complete sets of crankcase gaskets, as follows:		
	4	V6-1605G—Gaskets	.10	.40
	2	V6-1605AG—Gaskets	.15	.30
	24	V6-1607G—Gaskets	.50	12.00
	2	V6-1609G—Gaskets	.40	.80
				$55.72

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 11/22/48

Sold to: Compania Naviera Limitada
c/o Simpson, Spence Young Co.
52 Broadway
New York, N. Y.

Invoice No., 67483
Invoice Date, 11/22/48
Vendor's No., R-2840

Shipped to: do
Date Shipped: 11/22/48
Via, Railway Express

From Oakland, Calif.
F.O.B. Oakland, Calif.

Item	Quantity	Description	Unit Price	Amount
		AV6		
1	6	3221 H.P. fuel lines from manifold to valves	@ $9.00	$54.00

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U.S.A.

Date of Contract, 11/8/48

Sold to: Compania Naviera Limitada
c/o Simpson, Spence Young Co.
52 Broadway
New York, N. Y.

Invoice No., 67488
Invoice Date, 11/24/48
Vendor's No., R-2805

Shipped To: M. V. Urania
Long Beach

From Oakland, Calif.

Via, By Service Engineer
a/c Engine #42538, V-6,560/6—Urania

F.O.B. Oakland, Calif.

Item	Quantity	Description	Unit Price	Amount
1	2	AV6-3330—F.P. suct. valve assy.....@	$12.50	$ 25.00
2	2	AV6-3320—F.P. Disch. valve assy.....	12.50	25.00
3	45	V6-A1209—Fuel valve packing.....	.05	2.25
4	1	V66-1950A—F.W. Gauge		13.90
5	1	V6-1950—F.W. Gauge		13.90
6	9	V6-1216—Fuel valve seat gasket.....	.09	.81
7	1	Bottle lapping compound.....		.75
8	12	V6-1213—Fuel valve nozzle nut gasket	.05	.60
9	6	V6-3314A—Fuel valve plunger sheer washers	.29	1.74
10	18	V6-3302G—Copper gasket	.06	1.08
11	12	V6-3358—Copper gasket	.17	2.04
12	11	V6-3327-1—Copper gasket	.10	1.10
13	18	V6-3307G—Copper gasket	.12	2.16
14	6	V6-3316A—Copper gasket	.10	.60
15	6	V6-3316—Copper gasket	.08	.48
16	6	3358-V6—Copper gasket	.10	.60
17	1	3801B—F.P. cyl. locknut wrench.....		.60
18	1	3801A—F.P. valve cage locknut wrench		.50
19	1	8934—F.P. plunger nut wrench.....		1.15
20	1	15682—F.P. fitting wrench		3.10
21	1	809—F.P. priming pump cyl. wrench....		2.08
22	2	V6-1154A—Splash guard between valve lever brck.	1.00	2.00
23	12	M1369—10/32 RH screws 3/8 long.....	.001½	.06
24	12	M391—10-24 x 3/8 RH screw.....	.001½	.06
25	12	M396—12-24 x 3/8 RH screw.....	.002⅔	.08
26	6	,907—¼" tee BI.....	.21	1.26

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

Item	Quantity	Description	Unit Price	Amount
27	6	M604—¼ x 1½ nipple BI	.06	.36
28	3	V6-6633—A.S. Tubing connecting screw	1.25	3.75
29	6	V6-6633—Washer	.02	.12
30	6	K6-6634—5/16 tubing connector	1.00	6.00
31	12	M570—⅜ HP Union nut 41F	.20	3.48
32	6	M571—⅜ x ¼ P.T. half union 48F..@	.35	2.10
33	6	M569—⅜ x ¼ P.T. Elbow 49F	.44	2.64
34	6	M1125—¼ x ¼ P.T. comp. elbow 69F..	.31	1.86
35	6	M581—¼ x ⅛ P.T. comp. elbow 69F....	.26	1.56
36	6	M583—¼ x ⅛ P.T. comp. connector 68F	.17	1.02
37	1 Set	Straight shank drills		24.75
38	4½ lbs.	¼ OD copper tubing	.75	3.38
39	9¼ lbs.	5/16 OD copper tubing	.70	6.48
40	13 lbs.	⅜ OD copper tubing	.65	8.45
41	2	V6-3872—Piston stops	7.50	15.00
42	1	13/32 straight shank drill		.97
43	1	10-24 tap, #1 starting		1.00
44	1	#24 straight shank drill		.50
45	1	New type governor crosshead assy. for V6 engine		
46	1	New type governor weight assy. for V6 engine		125.00
47	1	V6-1310A—Governor casing oil deflector		5.00
48	1	Taper pin #8, 4" long, drilled		.50
49	1	M562—Steel cotter pin		No charge
50	1	V6-1490—Vertical shaft drive gear		120.00
51	1	V6-1403—Vertical shaft lower gear		97.50
52	1	3/16-¾" copper tube flaring tool		7.50
53	1	V6-3868—Fuel valve tip cleaning .014"		.10
54	12	M579—5/16" x 3" steel cotter pins		.15
55	12	V6-663G—1/16 x 7/16 x 21/32 oil terminal gaskets (cop.)	.06	.72
56	2	V6-1455—Lower vert. thrust shaft brg.	12.50	25.00
				567.79
		2½% sales tax		14.19
				$581.98

(Stamped) : Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 11/13/48
Contract No., Ltr.

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67488
Invoice Date, 11/26/48
Vendor's No., R-2825

Shipped To: M. V. Urania & Owners
c/o Steamship Corp., Ltd.,
365 West 7th St.,
San Pedro, California

Date Shipped: 11/17/48 From Oakland, Calif.

Via, United Air Freight F.O.B. Oakland, Calif.

Item	Quantity	Description	Unit Price	Amount
		a/c Engine #42538, V-6, 560/6—M. V. Urania		
5	1	V6-1005 Helical Gear	$172.50	
	1	V6-1405 Helical Gear	85.00	
	1	V6-1490 Helical Gear	120.00	
			377.50	
		Adjustment:		
		R-2805—Invoice #67488:		
	2	V6-1455 Lower Vert. Thrust Shaft Bearing (not received at Long Beach)	25.00	$352.50
		Sales Tax on Material 2½%		8.81
				$361.31

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 10/28/48

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No. 67509
Invoice Date, 11/26/48
Vendor's No., R-2776

Shipped To: M. V. Urania
Long Beach, California

Via, Service Engineer
3rd Progress Invoice

Description	Unit Price	Amount
Services—Engineer Cross: November 12th to November 25, 1948, both inclusive—14 days	@ $30.00	$420.00
Services—Engineer Firth: November 10th to November 19, 1948, both inclusive—110 hours	3.75	412.50
Services—Engineer M. L. Newell: November 11th to November 16, 1948, both inclusive—61½ hrs.	3.75	230.63
Services—Engineer S. W. Newell: Three days	30.00	90.00
		1,153.13
Compensation insurance on labor		36.62
Expenses as attached		441.83
Prepaid Air Freight Charges to Los Angeles 11/12/48		6.80
Prepaid Air Freight Charges to Los Angeles 11/13/48		1.55
Telephone Calls 11/11	$5.63	
11/15	3.06	
11/15	3.56	
11/16	4.06	16.31
		$1,656.24

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 10/28/48

Sold To: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67509
Invoice Date, 11/26/48
Vendor's No., R-2776

Expenses of Service Engineers:

Description	Unit Price	Amount
Service Engineer Cross:		
November 1 to November 10	None	
November 11—Hotel	32.00	
November 13—Meals	4.80	
November 14—Meals	3.00	
November 15—Hotel	16.00	
November 16—Meal	$1.25	
Mex. tourist card	1.50	2.75
Paid United Service		
Repairs—2 Fresh Water Coolers, 1 Oil Cooler	140.65	U. S. $ $199.20
November 23—Air Transportation Manzanillo to Guadlajara	M. $ 61.00	
Meals	18.25	
November 24—Air Transportation Guadlajara to Los Angeles	491.15	
Meals	11.50	
Taxi	10.00	
November 25—Meals	2.00	
	594.01 @ 6.78	87.61
Air Transportation to Oakland		42.10
Taxi		2.50
		331.41
Adjusting previous billing Engineer Cross:		
Expenses to October 31, 1948:		
Mexican Exchange shown as $5.85 or M. $641.18	$109.61	
Should have been @ 6.78 or M. $641.18	94.58	15.03
		316.38

(Deposition of Sidney W. Newell.)

Respondent's Exhibit A-17—(Continued)

The Union Diesel Engine Company
2200 East Seventh Street
Oakland 6, California, U. S. A.

Date of Contract, 10/28/48

Sold to: Compania Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, N. Y.

Invoice No., 67509
Invoice Date, 11/26/48
Vendor's No., R-2776

Description	Unit Price	Amount
Service Engineer Firth:		
Auto mileage Oakland to Long Beach and return, including local use of auto at Long Beach and Los Angeles—1,025 miles....@ $.04	$41.00	
November 10—Meals and hotel en route.....	6.15	
November 19—Meals and hotel en route.....	3.70	$50.85
Service Engineer M. L. Newell:		
Phones and miscellaneous expenses.....		4.85
Services S. W. Newell:		
Auto mileage 150 miles .....@ $.04	6.00	
Hotel and meals	8.50	
Phone	5.25	
Personal tools furnished (not returned) as agreed	50.00	69.75
		$441.83

(Stamped): Paid Dec. 7, 1948, Union Diesel Engine Co.

(Admitted April 14, 1949)

Mr. Howard: Next, if the Court please, as to Identifications A-21, A-22 and A-23, being survey reports of Mr. Pike, Mr. Dupuy and Mr. Summers, identified in depositions yesterday, we have agreed with counsel for the cross respondent that it may be the law of the case that these survey reports so identified may be admitted for the purpose of showing the Court the truth of the matters within the personal knowledge or observation of the surveyors as shown in their reports and in their testimony.

The Court: Excluding therefrom statements by him based obviously upon hearsay?

Mr. Howard: That is correct, Your Honor.

Mr. Hokanson: For the record, Your Honor, may the record show that this stipulation is made subject to my continuing objection, and that other than that we agree the survey reports are admissible to the extent Mr. Howard has announced.

The Court: The objection to each of these exhibits stated by counsel for the libelant and cross respondent is overruled in each instance. Respondent's Exhibit A-21 is admitted. Respondent's Exhibit A-22 is admitted. Respondent's Exhibit A-23 is admitted.

(Respondent's Exhibits A-21, A-22 and A-23 received in evidence.)

RESPONDENT'S EXHIBIT A-21

American Bureau of Shipping
45 Broad Street, New York 4, N. Y.

(This form is to be used in confirmation of class only.)

Report No. 3261

Los Angeles Harbor November 17, 1948
M. V. "Urania"

This Is To Certify that the undersigned surveyor to this Bureau did at the request of General Steamship Company, agents, attend the steel screw motor tank vessel "Urania" of Panama, R.P., Gross Tons 690, while she lay afloat at the Craig Shipyards, Long Beach, California on November 11, 1948, and subsequent dates, in order to report on condition of the vessel for damage in way of main engine, and for permanent repairs carried out at this time. For further particulars see vessel's log books and report as follows:

The vessel arrived at this port under tow of tow boat "Pacific Retriever" on November 11, 1948.

Upon Examination Found

Main Engine

1. A total of four (4) upper and lower helical timing gears destroyed.

Recommended: Remove and replace necessary parts to renew four (4) destroyed helical timing gears.

2. Water jacket gasket in way of lube oil terminal on the port side of the No. 2 cylinder leaking.

Recommended: Renew gasket.

3. A total of 13 leaks in way of joints of two (2) fresh water coolers and one (1) lube oil cooler.

Recommended: Coolers to be cleaned, repaired, tested and proved tight.

4. Signs of contaminated lube oil, and salt water in sumps of engine base.

Recommended: Clean and flush lube oil system and install new lube oil.

5. The No. 6 crank bearing was opened, cleaned, examined and found satisfactory and closed up in good order.

Recommended: Satisfactory.

6. The No. 7 main bearing was opened, cleaned, examined and found satisfactory and closed up in good order.

Recommended: Satisfactory.

7. The main, thrust bearing was opened, cleaned, examined and found satisfactory and closed up in good order.

Recommended: Satisfactory. Flush and install new lube oil.

8. Overhead camshaft journals and bearings were cleaned, examined and found satisfactory.

Recommended: Satisfactory.

9. Vertical shaft in way of damaged timing gears.

Recommended: Check for truth. Close up main engine ready for service.

Upon completion of the above recommended repairs a dock trial and a sea trial was held and proved satisfactory. It is recommended that the vessel be retained in her present classification with this Bureau.

/s/EDWIN W. PIKE,
Surveyor.

Respondent's Exhibit A-21 admitted April 14, 1949.

Claimant's and Cross-Libelant's Exhibits X-1 and X-2 inclusive, for identification March 25, 1949.

RESPONDENT'S EXHIBIT A-22

Lloyd's
Survey No. L 265-48

Certificate of Appointment of Surveyor by Lloyd's Agent for the Purpose of Survey on Ship

A request for the appointment of a Surveyor having been received by us from General Steamship Corporation the Ship Agents of the M. V. "Urania"

We, Best and Company, Lloyd's Sub-Agents, at Los Angeles, California, certify that Frank S. Dupuy and Son, Marine Surveyors has been instructed by us to survey that vessel, and we believe

Respondent's Exhibit A-22—(Continued)

confidence may be placed in this certificate, which is attached.

Issued without prejudice and subject to the terms, conditions and amount of the Policy of Insurance.

The following fees have been paid to us by the Ship Agents:

Surveyor's Fee	$105.00
To charges of Captain Walter Gay, Lloyd's Agent, San Francisco...	23.25
Agency Fee	20.00
To miscellaneous expense	6.56
	$154.81

BEST and COMPANY,

By /s/ FRANK G. NIVER,
Lloyd's Sub-Agents.

Los Angeles, California
Dated: December 10, 1948.

Frank S. Dupuy & Son
Consulting Engineers
Marine Surveyors
Wilmington, California

Report of Survey

No. 1086 November 23, 1948

M. V. "Urania"

At the request of the Owners, and of Best & Company, Lloyd's Sub Agents, Los Angeles, California,

Respondent's Exhibit A-22—(Continued)

we the undersigned Surveyors, did on November 11, 1948 and subsequently, attend on board the M. V. "Urania" 690 tons gross register of Panama, as she lay afloat at the Craig Ship Building Company, Long Beach, California.

Survey was made for the purpose of ascertaining the nature and extent of main engine damage stated sustained on voyage from Seattle, Washington, to Panama on or about October 26, 1948 requiring the vessel to put in at Manzanillo, West Coast of Mexico for repairs and subsequently to turn back to Los Angeles Harbor under flat tow.

For further particulars see vessel's Log Books.

Log Books written in Greek.

Please find attached, Owners translation of Deck and Engine Log Books.

The undersigned upon examination:-

Found: Timing gears to be seriously worn on tooth contact faces, four (4) gears effected, two top and two bottom gears on the virtical shaft that drives the cam-shaft.

Recommended: Timing gear assembly to be checked for true alignment. Vertical shaft to be placed in lathe and checked for truth. Crank shaft deflection readings to be taken and thrust bearings examined.

Found: Evidence of salt water in lube oil system.

Recommended: Lube oil cooler to be tested.

Found: Lube oil cooler found leaking between

Respondent's Exhibit A-22—(Continued)

salt water cooling and lube oil side, allowing salt water to contaminate the lube oil.

Recommended: Lube oil cooler to be soldered where leaking and proven tight under one-hundred pound (100#) hydrostatic test.

Found: Lube Oil System.

Recommended: Lube oil system to be thoroughly cleaned and flushed to remove all steel particles and salt water.

Found: Damaged timing gears.

Recommended: Four new timing gears to be installed and gear tooth faces to be blued to insure correct alignment.

Found: Trials.

Recommended: On completion of repairs a dock trial of six hours and subsequently a sea trial of four hours at full power are to be held.

Found: Examination of new gears.

Recommended: At the conclusion of the trials, the new gears are to be examined and checked for true alignment.

Remarks:

Repairs were carried out as recommended to the satisfaction of Owners' Representative, Classification and Underwriters Surveyors.

At the conclusion of trials the timing gears were examined and found in good order. Four new timing gears were placed on board as spares.

All labor and material for the repairs as recom-

Respondent's Exhibit A-22—(Continued)

mended was furnished by the Union Diesel Service Department of Oakland, California. Mr. Cross of Union Diesel was flown from Oakland, to Manzanillo, Mexico to supervise the installation of the two new timing gears which failed after thirty-six hours of service—(see Log). Mr. Cross returned to Los Angeles Harbor on the vessel.

Summary

Estimated cost of repairs.

Union Diesel Co.

New timing gears (six total) Plus freight —approximately $1000.00

Labor, expenses, etc., for three service men—approximately 1700.00

Pacific Towboat & Salvage Co.

Two days in way to vessel and five days towing 4300.00

$7000.00

In addition to the above estimated costs, the Owners will be submitting accounts covering Port charges etc.

Repairs Commenced — November 11, 1948

Repairs Completed — November 17, 1948

Attending at this Survey:-

Mr. H. J. Summers, Representing the Owners.

Mr. E. W. Pike, Representing American Bureau of Shipping.

Mr. G. M. Dupuy, Representing Lloyd's Sub Agents.

Respondent's Exhibit A-22—(Continued)

Because of the leaking lube oil cooler and the salt water found in the lube oil system it appears that the failure of the timing gears was caused by this condition.

FRANK S. DUPUY & SON,

/s/ GEORGE M. DUPUY,
Surveyor.

M/T "Urania"

Deck Log Extracts from October 26, 1948 to November 11, 1948 while vessel on way from Seattle, Washington, to Panama Canal — southbound on orders.

Oct. 26:

1520 Stopped the engine to clean the filters. Chief Engineer discovered that gear of the vertical shaft thrust bearing and the gear of the vertical shaft drive are galled. Ship's engineers trying to do something. Latitude 18° 15′ north longitude = 104 — 24 West.

1930 We called up the Owners at New York by ship's radio telephone, and they ordered us, soon as Chief Engineer fix temporary the above gears, to proceed Los Angeles, Calif.

2330 Engine started to run 145 RPM. Changed course to 297° true proceeding to Los Angeles.

Respondent's Exhibit A-22—(Continued)

Oct. 27:

0400 Partly cloudy and light WNW/ly breeze and moderate swell long length. Engine runs on half speed RPM 150.

0800 Partly cloudy and light WNW/ly breeze and moderate swell long length. Engine runs on half speed RPM 150.

1145 Chief Engineer reported at bridge, that he can't give guarantee for the engine to continuing our destination to Los Angeles. So it was necessary to proceed the nearest port, which is Manzanillo, West Coast of Mexico. Light WNW/ly breeze and moderate swell short length. Vis. good. From Noon position to Manzanillo 63 miles to go. Engine runs 145 RPM.

1600 Clear and gentle NW/ly breeze and moderate swell and vis. good.

2000 Clear and gently W/ly breeze and moderate swell and vis. good.

2300 Outside of Manzanillo entrance, waiting for early morning to get the Pilot Station.

2400 Clear and gentle WNW/ly breeze and moderate swell and vis. good.

Oct. 28:

0730 Arrived at Manzanillo Pilot Station. Standby engine.

Respondent's Exhibit A-22—(Continued)

0748 Stopped engine.

0750 Pilot, Mr. G. Borda Davalos, aboard. Proceeding to the anchorage of Manzanillo Harbor, under pilot instructions.

0815 Arrived at anchorage. Stopped the engines.

0820 Dropped starboard anchor 2½ shackles in the water.

0825 FWE. Custom house and doctor and Immigration aboard.

0830 We took free pratique.

0835 Doctor and Immigration and Custom house and Pilot, left the ship.

1200 Sea watches broken.

1600 Clear and gentle NW/ly breeze. Vessel swinging at starboard anchor chain.

1800 Day ends—clear.

Oct. 29:

0600 Day comes fine and clear.

0800 At Manzanillo anchorage on account of engine trouble.

0800 Clear and calm.

0800 Fokion Kritikos, able seaman, absent from his duty without any permission.

1100 Ship's engineers refused to dismantle the necessary parts. We hired two machinists from shore and done the job.

Respondent's Exhibit A-22—(Continued)

1200 Clear and light NW/ly air.

1600 Clear and light NW/ly breeze.
Day ends—clear.
At anchorage on account of engine trouble.
Vessel swinging at starboard anchor chain.

Oct. 30:

0600 Day comes fine and clear.

0800 Clear and calm.
At anchorage of Manzanillo Harbor on account of engine trouble.

1200 Partly cloudy and light ENE/ly breeze.

1600 Partly cloudy and calm.

1800 Partly cloudy and calm.

1930 Union Diesel service man arrived from Oakland, Calif. Made engines inspection. (Mr. Cross.)

0600 Day comes partly cloudy and light SSW/ly air.

0800 Clear and light S/ly air.
Union Diesel service man started to work on engine.

1200 Clear and light S/ly breeze.

1700 Mostly clear and calm.

1700 Union Diesel service man K.O. for day.

1800 Day ends—mostly clear.

Respondent's Exhibit A-22—(Continued)

Nov. 1:

0600 Day comes mostly clear.

0800 Mostly clear and light NNE/ly air.
At Manzanillo anchorage on account of engine trouble.

1200 Mostly clear and light S/ly air.

1700 Mostly clear and light NNW/ly breeze.

1800 Day ends—mostly clear.

Nov. 2:

0600 Day comes partly cloudy and calm.

0800 Partly cloudy and calm.

1200 Partly cloudy and light S/ly air.

1600-1630 Engine trial at anchorage.

1700 Partly cloudy and light SSE/ly air.

1800 Day ends—mostly clear.

Nov. 3:

0600 Day comes partly cloudy and calm.

0800 Partly cloudy and calm.

1045 Immigration inspector aboard to check the crew.

1110 Pilot, Mr. G. Borda Davalos, aboard for engine trial.

1120 Engine on standby. 1121—Started to heave anchor up.

Respondent's Exhibit A-22—(Continued)

1130 Anchor aweighed, clow ahead. 1135—Engine stopped.

1140 Engine started slow ahead. 1143—engine stopped.

1155 Engine started on slow ahead. 1205—Full speed ahead.

1230 Engine on slow ahead.

1245 Union Diesel service man reported at bridge that it is necessary to return back to the anchorage to check the valve timing.

1255 Arrived at anchorage. Stopped the engines.

1300 Dropped starboard anchor 2 shackles in the water. 1305—FWE.

1310 Pilot and Immigration inspector left the ship.

1555 Pilot, Mr. G. Borda Davalos, aboard for engine trial.

1600 Engine on standby. Started to heave anchor up.

1605 Anchor aweighed. Slow ahead. 1615—Finished with engine trial. Awaiting for Immigration Inspector. 1635—Immigration Inspector aboard. 1638—Pilot and Immigration inspector left the ship.

Slow ahead. 1650 — Full ahead proceeding our destination to Los Angeles. Light W/ly breeze and moderate swell.

Respondent's Exhibit A-22—(Continued)

2400 Clear and gentle NW/ly breeze and moderate swell. Vis. good.

Nov. 4:

0400 Partly cloudy and gentle NW/ly breeze and moderate swell. Vis. good.

0800 Partial clouds and gentle NW/ly breeze and moderate sea and visibility good.

0900 Stopped the engine to inspect the new gears.

1002 Full ahead. Gears inspected everything O.K.

1200 Partly cloudy and light WNW/ly breeze and moderate sea and vis. good.

1600 Broken cloudy and gentle NW/ly breeze and slight sea and vis. good.

1820 Due to heavy swell it was necessary to pump more ballast in the No. 3 tank.

2000 Mostly clear and gentle NW/ly breeze and slight sea and vis. good.

2400 Partly cloudy and moderate WNW/ly wind and moderate sea and vis. good. Ship pitching heavy.

Nov. 5:

0400 Partly cloudy and moderate NNW/ly breeze and moderate sea and vis. good. Ship pitching heavy.

Respondent's Exhibit A-22—(Continued)

0405 Engine ⅓ speed ahead, on account of lower vertical shaft—gears going bad. 0630—Contacted Coast Guard, they are sending tug.

Nov. 5:

0635 Stopped the engine. Oil contaminated with steel from gears.

0800 Clear and gentle to moderate WNW/ly breeze and moderate sea.

1145 Engine started to run ⅓ ahead RPM 160.

1200 Mostly clear and light N/ly breeze and slight sea and vis. good.

1321 Engine shut down.

1600 Clear and gentle NNW/ly breeze and slight sea and vis. good.

1655 Engine started on slow ahead. 1845—engine stopped.

2005 Engine on slow ahead. Clear and light NNE/ly breeze and slight sea.

2105 Engine shut down. 2300—engine runs on slow ahead.

2400 Engine shut down.

2400 Clear and light NNW/ly breeze and slight sea and vis. good.

Nov. 6:

0300 Engine on slow ahead.

Respondent's Exhibit A-22—(Continued)

0400 Clear and light NNE/ly breeze and slight sea and viz. good.

0407 Engine shut down.

0700 Engine running slow ahead.

0800 Partly cloudy and light NNE/ly breeze and moderate swell and viz. good.

0830 Tug Pacific Retriever alongside, while our engine was running. They ordered us to stop the engine. They gave us towing line and fastened a bridle. Our crew fastened the bridle. They started towing at 8:52 a.m. Clear and light NNE/ly breeze and moderate sea and viz. good.

1200 Partly cloudy and light NNW/ly breeze and low swell and viz. good. Continued towing.

1600 Clear and light W/ly air and low swell and viz. good. Towing continued.

1635 Abeam Cape Falso. Altered course to 312° true.

2000 Clear and moon light and W/ly light breeze. Low swell and vis. very good. Towing continued.

2400 Clear and light W/ly breeze and low swell and viz. good. Towing continued.

Nov. 7:

0400 Clear and light NNW/ly breeze and low swell and vis. good. Towing continued.

Respondent's Exhibit A-22—(Continued)

1800 Clear and light NW/ly air and low swell short and vis. good. Towing continued.

1200 Clear and light NW/ly air and low swell short and vis. good. Towing continued.

1410 Abeam Cape San Lazaro.

1600 Light overcast and light NW/ly air and low swell and vis. good. Towing continued.

2000 Partly cloudy and light NY/ly air and low swell and vis. good. Towing continued.

2400 Similar weather. Towing continued.

Nov. 8:

0400 Cloudy and light N/ly air and low swell and visibility very good. Towing continued.

0800 Similar weather.

1200 Partial clear and light N/ly air and smooth sea and vis. good. Towing continued.

1600 Cloudy and moderate N/ly wind and moderate sea and vis. good.

2000 Clear and moderate N/ly wind and moderate sea and vis. good.

2035 Abeam Natividad I.

2400 Clear and moon light and moderate NNE/ly wind and heavy swell. Ship rolling heavily and vis. good. Towing contd.

Respondent's Exhibit A-22—(Continued)

Nov. 9:

0200 Abeam San Benito I.

0400 Clear and moderate NE/ly wind and heavy swell. Ship rolling heavily and vis. good. Towing continued.

0800 Clear and strong NE/ly wind and rough sea and visibility very good. Ship is suffering in rolling and pitching heavily.

1200 Clear and moderately NE/ly wind and moderate sea and vis. good. Towing continued.

1600 Clear and N/ly gentle breeze and moderate sea and vis. good.

1607 We dropped anchor at Punta San Carlos anchorage to trans. for fuel oil (Diesel oil) to tug Pacific Retreiver.

1603 Commenced pumping on fuel oil (Diesel oil).

1900 Finished with pumping on fuel oil. Tug received 1680 gallons Diesel oil, from the Motor Tanker "Urania."

1921 Started to heave anchor up.

1930 Anchor aweighed. 1940—they started tow.

2000 Clear and moon light and NNW/ly light breeze and vis. good.

2400 Clear and moon light and NNW/ly light breeze and smooth sea and vis. very good. Towing continued.

Respondent's Exhibit A-22—(Continued)

Nov. 10:

0400 Clear and light NNW/ly air and smooth sea and vis. good. Towing continued.

0800 Clear and light NNW/ly air and smooth sea and vis. very good. Towing contineud.

1200 Clear and light NW/ly breeze and smooth sea and vis. good. Towing continued.

1600 Similar weather. Towing continued.

1645 Abeam Todos Santos Is. 5¾ miles off.

2000 Cloudy but bright and light NW/ly breeze and hazy horizon and low swell and vis. moderate. Towing continued.

2400 Clear and moon light and NW/ly light air and moderate swell and vis. good. Towing continued.

Nov. 11:

0400 Clear and light W/ly air and smooth sea and visibility very good. Towing continued.

0800 Cloudy but bright and hazy horizon and low swell and light NW/ly breeze and vis. moderate. Towing continued.

0825 Started to pump the ballast out.

0930 Engine on standby.

1020 Dropped anchor at San Pedro anchorage. Quarantine Station.

Respondent's Exhibit A-22—(Continued)

0945 Doctor aboard.

1000 We took free partique.

1005 Immigration Inspector and Customhouse aboard.

1150 Immigration Inspector and doctor and Customhouse left the ship.

1217 Started to heave anchor up.

1230 Anchor aweighed. Proceeding to the dock on the assistance of the tug Pacific Retreiver.

1330 Docked ship at Craig Shipbuilding Co. pier.

1340 Tug Pacific Retreiver left the ship.

1345 All fast fore and after alongside to the pier.

Day ends—fine and clear.

ANDREAS BEIS,

Master.

M/T "Urania"

Engine Log Extracts from October 26, 1948 to November 11, 1948 while vessel on way from Seattle, Washington, to Panama Canal—southbound on orders.

Oct. 26:

1520 Revolutions of engine reducing from normal 290 RPM to 240 and in continuation increased to 320. Reduced again periodically. A knock was heard at after end of engine.

Respondent's Exhibit A-22—(Continued)

Stopped engines for inspection, and discovered that the lower timing gears were galled and could not keep engine running. Cleaned gears and reassembled.

Oct. 27:

2330 Engine ahead. Could not run at more than 150 RPM. Engine running at 150 RPM. Excessive smoking of engine and uneven motion. Knocking.

Oct. 28:

0820 Stop engines.

Oct. 29:

1000 Engine dismantled with help of machinists.

Oct. 30:

1930 Union Diesel Service man arrived on board and made inspection of engine.

Oct. 31:

0800 Union Diesel Service man, Mr. Cross, with assistance of ship's force removed vertical drive shaft of timing gears. Shaft was taken out to machine shop on shore and checked for bend. Rectified slight bend on lower part of vertical shaft.

Placed additional lubrication lines to timing gears and governor.

Nov. 1:

Engine was timed by Union Diesel Service man with assistance of ship's force.

Respondent's Exhibit A-22—(Continued)

Nov. 2:

Timing of engine continues.

Nov. 3:

1100 Timing of engine completed. Engine ready for sea trial.

1150 Engine full ahead. Operation of engine uneven and irregular. Pistons hitting valves.

1330 Stop engine for inspection of timing.

1600 Timing readjusted.

1635 Various maneuvers.

1640 Engine full ahead at 300 RPM.

Nov. 4:

1900 Stop engine for inspection of timing gears by Union Diesel Service man. Found in good order.

1000 Full ahead at 325 RPM.

2100 Vessel pitching heavily and propeller emerging from water. Engine racing up to 330 RPM.

Nov. 5:

0350 Vessel pitching and engine racing. Engine started running irregularly. Stopped engine, and made inspection. Discovered lower timing gears galled again. After conference with Union Diesel Service man and further test of running condition, informed Captain that vessel cannot proceed safely with own power. Further discovered lubricating oil contaminated with steel particles.

Respondent's Exhibit A-22—(Continued)

Cleaned system and changed lub oil.

1150 Engine slow ahead 150 RPM.

1300 Stop engine.

1500 Engine slow ahead 140 RPM.

1600 Stop engine.

1900 Engine slow ahead 140 RPM.

2000 Stop engine.

2300 Engine slow ahead 140 RPM.

2400 Stop engine.

Nov. 6:

0300 Engine ahead slow 140 RPM.

0400 Stop engine.

0700 Engine slow ahead 140 RPM.

0800 Various maneuvers.

0835 Stop engine.

Nov. 7:

Engine stopped.

Nov. 8:

Engine stopped.

Nov. 9:

Engine stopped.

Nov. 10:

Engine stopped.

Nov. 11L

1000 Engine ahead for various maneuvers.

1025 Stopped engine.

Respondent's Exhibit A-22—(Continued)

1330 Finished with engine.

P. BAXEVANIS,
Chief Engineer.

Respondent's Exhibit A-22 admitted April 14, 1949.

Claimant's and Cross-Libelant's Exhibits Z-1 to Z-8 inclusive, for identification March 26, 1949.

RESPONDENT'S EXHIBIT No. A-23

Harry J. Summers
Marine Surveyor
San Pedro, California

November 19, 1948

M. T. "Urania"

1. This is to certify that the undersigned, H. J. Summers Marine Surveyor, did at the request of the General Steamship Corporation, Agents, attend the Motor Tank vessel "Urania", of Panama, R. P., 690 gross tons, owned by Compania Naviera Limitada of New York, while she lay afloat at the yards of the Craig Shipbuilding Company, Long Beach, California on November 11, 1948 and subsequent dates in order to examine and report on condition of the main engine stated to have developed operating trouble which was first noticed on October 26, 1948 while on voyage from Seattle, Washington to Panama Canal. For particulars see Engine Room and

Deck Logs, October 26th to November 11th and report as follows:—

2. Others attending were Mr. D. Antippas representing the Owners, Mr. E. W. Pike representing the American Bureau of Shipping, Mr. George S. Dupuy representing Lloyds Agent for the underwriters and Mr. Cross representing the Union Diesel Engine Company builders of the engine.

3. The main propelling engine is a 6 cylinder (14″x19″) four cycle Union Diesel rated at 560 H.P. at 325 R.P.M. Engine slowed October 26th; was dismantled, lower timing gears found cut and damaged and were renewed by Union Diesel service man and additional lubricating lines to gears and governor were installed. Engine again ready for operation on November 3rd (see log). On November 5th lower timing gears on vertical shaft were found damaged again and unfit for service and operation of engine was discontinued November 6th. Tug "Pacific Retriever" alongside November 6th and towed vessel to Craig Shipbuilding Company, Long Beach, California arriving 1:30 p.m. November 11, 1948.

4. Main engine was opened up for survey and examination revealed lower helical gears on vertical shaft destroyed. Vertical shaft checked in lathe and found satisfactory. Bearings found O.K., new gears and two new thrust bearings supplied and installed with new governor crosshead and new lubricating oil lines. Serious leaks found in lubricating oil coolers and in fresh water coolers which were dirty and clogged up. One lube oil cooler and two fresh water

coolers were removed from the ship and sent to service representatives of the manufacturers who cleaned, overhauled and tested the units in good order. These units were reinstalled and the engine closed up and adjusted. A leak was repaired around the fuel injection of No. 2 cylinder and considered satisfactory. Main engine crank shaft and thrust bearing were checked for alignment and found satisfactory. Main engine crank case was thoroughly cleaned and washed down and new lubricating oil supplied throughout the system.

5. It is my opinion that salt water leaks contaminated the lubricating oil to such extent that efficient lubrication of the gears was not possible and that faulty lubrication contributed to the failure of the gears.

6. On November 17th the vessel was given a suitable full power sea trial and performed to the satisfaction of all parties concerned. After the trial the new timing gears were examined and found satisfactory.

7. Vessel was scheduled to sail at 8:15 p.m. November 17, 1948 for Cristobal, C.S. where the Master will be given orders. Vessel is considered satisfactory to proceed on the voyage specified.

/s/ H. J. SUMMERS,
Surveyor.

Claimant's and Cross-Libelant's Exhibit "V" for identification, March 26, 1949.

Petitioner's Exhibit A-23 admitted April 14, 1948.

Mr. Howard: We have one further stipulation, if [1164] the Court please. This is with respect to the items in the claim of the cross libelant based upon the per diem operating expense of the Tanker Urania. Let it be stipulated that the reasonable per diem operating expense of the Tanker Urania during the periods involved in the libel and cross libel in 1948 was the sum of $250.00 per day, made up of the following general items: crew's wages and overtime, hull and P.I. insurance, allowance for depreciation, victualing expense, expenditures of stores for the deck, engine and steward's department, and that no allowance for bunker fuel is included in said figure of $250.00 per diem.

It is further stipulated that nothing is conceded by cross respondent as to the relationship of such per diem operating expense to the claims of the cross libelant for damages.

Mr. Hokanson: Subject to the continuing objection, it may be so stipulated.

The Court: You may proceed.

CRAIG WALLACE

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows: [1165]

Direct Examination

By Mr. Howard:

Q. Will you state your name and residence address, please?

(Testimony of Craig Wallace.)

A. My name is Craig Wallace, 1938 11th Avenue North, Seattle.

Q. What is your occupation?

A. I am manager of chartering for the Pacific Northwest for General Steamship Corporation, Ltd.

Q. Where is your principal office?

A. San Francisco.

Q. Where do you maintain your office?

A. Seattle.

Q. As manager of the chartering department, what do your duties involve, generally and briefly?

A. Very briefly, my duties are chartering—in other words, finding a cargo or finding a vessel to charter for a voyage or for a period, and also the operational details as an agent for those vessels when they happen to be in this port or elsewhere.

The Court: Where did you reside prior to your twentieth birthday, Mr. Wallace?

The Witness: New York City, sir.

The Court: Anywhere else?

The Witness: No, sir.

Q. Reverting now to the statement you made concerning [1166] operating details of the vessel, will you explain a little more in detail what that involves, please?

A. It does not involve ownership. It involves work on behalf of a shipowner when his vessel happens to be here and he happens to be elsewhere. It is a matter of entering the vessel, giving her necessary supplies, loading, discharging, doing certain repairs if he has no one to supervise it on his

(Testimony of Craig Wallace.)

behalf, clearing, and other details while the vessel happens to be in the port.

Q. How about expenses involved in connection with the operation of the vessel in port?

A. In the chartering end of my business, I have to have a general idea which is acceptable to owners and which I find from asking various owners of what a prime cost per day of various types of vessels would be which he might endeavor to charter.

Q. Speaking now of your services acting for owners in connection with the operating details of a vessel in the port, do you take care of the ordering of supplies as necessary?

A. I do, or Mr. Lund, who is with me.

Q. How long have you been engaged in that particular type of work?

A. I went into the shipping business in the fall of 1936. I would say about a year later I started in this [1167] particular field of agency work in port.

Q. How long have you been connected with the General Steamship Corporation?

A. I joined them in January of 1946.

Q. With what company were you connected prior to that time?

A. Funk Ede Company in New York.

Q. In your participation in that work, will you state whether or not you have any knowledge of the manner in which agency accounts are handled on various ports on the Pacific Coast?

A. Yes, I have some knowledge of that.

No. 12322

United States
Court of Appeals
For the Ninth Circuit.

COMPANIA NAVIERA LIMITADA, a Corporation, Claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment,

Appellant,

vs.

E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair,

Appellee.

Apostles on Appeal
In Four Volumes
Volume IV
(Pages 1351 to 1738)

Appeal from the United States District Court
Western District of Washington,
Northern Division.

FILED
JAN 4 - 1950

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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(Testimony of Craig Wallace.)

Q. Will you state, please, what the practice is with respect to the approval of accounts by the master of a vessel for expenses incurred in connection with the normal arrival or departure of a vessel from a port other than the home port of a vessel?

A. The ideal situation would be to have each voucher for every expense signed by the master before payment, or authorized by the owners before payment.

Mr. Hokanson: I object to the answer as not responsive.

The Court: As I understand it, he means the ideal agency situation, is that what you meant?

The Witness: That is what I meant. [1168]

The Court: The objection is overruled.

Q. Did you complete your answer?

A. Yes.

Q. Well, is that ideal situation adopted as a matter of practice?

A. No, as a matter of practice it often cannot be adopted.

Q. Why not?

A. Some of the vouchers appear after the vessel has sailed, and some of them, an agent does not always consider it necessary to make too much of an effort to obtain the captain's signature, providing they are not vouchers covering a matter of law of the land.

Q. Can you give us an illustration of that type of voucher?

A. When a foreign vessel enters an American

(Testimony of Craig Wallace.)

port, they pay a tonnage tax of 6 cents a ton, and it isn't necessary for a captain to sign that.

Q. Can you give us another illustration?

A. For example, with Panamanian vessels it has become quite customary not to necessarily have the captain sign the voucher from the Panamanian consul.

Q. Why not?

A. Because their laws of the land under whose flag the vessel flies, it is found it is very difficult to [1169] object to charges made by consul.

Mr. Hokanson: I object to the answer as involving speculation of the witness.

The Court: The objection is overruled.

Q. What would you say the practice would be with respect to invoices for broker's services or immigration services?

A. Those again I don't think it is imperative that they be signed by the master.

Mr. Hokanson: I object to the answer as involving the opinion of the witness.

The Court: The objection is overruled, in view of the witness' stated experience.

Q. How about the invoices that would be presented for the agency fee of the ship's agent?

A. In this area, that is prescribed by a brokerage scale which has been adopted by the major agents on the Pacific Coast, so I don't think it is absolutely necessary for the captain to sign it.

Q. How about any charges for telephone service or cable service or items of that nature?

(Testimony of Craig Wallace.)

A. Again, I would say it is preferable to have those signed for. If they cannot be, and it is a responsible agent, and each telephone and cable is proved in the eyes of the agent to be on ship's business, I think it would be [1170] permissible to let that go without a signature, which we have done in the past.

Q. Can you state generally what your practice has been and your experience with respect to the approval and payment of vouchers which are not presented until after the ship departs from the port?

A. Well, it is a matter of one's own experience. I would try to say it briefly, that those items which were requested or asked for by the master, not by the agent, but perhaps through the agent should definitely be signed by the master before they are paid.

If the ship happens to get away from the port before those vouchers appear, our policy would be to send it to the master, if possible, at the next port or to the owners prior to making payment.

Q. Handing you Identifications A-9, A-10 and A-11, I will ask you to examine those very hastily, if you will, please. Have you ever seen them?

A. Yes, I have.

Q. Do you know what they represent, what they purport to represent? A. Yes.

Q. State what they purport to represent?

A. They purport to represent two calls of this vessel at the fort of Manzanillo. [1171]

(Testimony of Craig Wallace.)

Q. The vessel you are referring to is the Urania?

A. Yes.

Q. Generally, what items are included on those identification numbers?

A. I would say generally it is goods and services furnished the vessel during the call at this port on two occasions, and also services which apparently were required by the Mexican authorities.

Mr. Hokanson: I object to all this line of questioning, Your Honor, as not being proper examination in respect to these invoices. They are not within the personal knowledge of this witness. He is speculating as to what they represent.

The Court: The Court has in mind he has been called as one familiar with business practice of this nature and his qualifications have been tentatively stated, at least.

Mr. Hokanson: I concede the qualifications of the witness, Your Honor, but he is reading documents which contain statements on the basis of which he identifies the document. The instrument to that extent is self-serving and hearsay.

The Court: Is the instrument already in evidence?

Mr. Hokanson: It is not, Your Honor.

Mr. Howard: It has been identified only. [1172]

The Court: You cannot read the instrument into evidence. You can let him look at it, but you cannot have him state what is in it. I do not think it is proper for the examiner to state what is in it, for

(Testimony of Craig Wallace.)

anything to be done in respect to the record relating to it, and the objection is sustained.

Q. Referring, Mr. Wallace, to Identification A-9, to page 4, item 4, identified as C-4—can you locate that? A. Yes.

Q. Do you have that in front of you?

A. Yes.

Q. The fourth one? A. Yes.

Q. Will you state whether that item is one of a nature that would generally in your experience be approved by the agent without requiring the endorsement or approval by the master?

Mr. Hokanson: Same objection, Your Honor.

The Court: Overruled.

A. In answer to that, I would say that if there is a tariff which has been built up through practice or accepted by the trade as custom, it would not be necessary for the captain to sign it; and in most ports the pilot prior to leaving the vessel obtains the captain's signature, so that question has never arisen in Seattle, to my knowledge. [1173]

Q. Are you referring now to the fourth item?

A. Pilotage.

Q. Can you state what the next item refers to?

A. Immigration.

Q. Directing your attention to that item on Identification A-9, what would be the practice with respect to requiring the approval of the master on that item?

A. Ordinarily in Seattle the bills would not be received prior to departure of the vessel, and we

(Testimony of Craig Wallace.)

would pass them for payment without the captain's approval.

Mr. Hokanson: May the record show my objection to all of this testimony, and on the additional ground that the witness is testifying as to a practice in Mexico, whereas his experience is limited to the coast of the United States.

The Court: The last objection is sustained.

Q. Mr. Wallace, do you have any knowledge from your experience as to the practice in ports in Mexico with respect to such items?

A. Well, it would be only a very general knowledge. Vessels over which we have control here and where I would see a disbursement account have not called at Mexico since I have been out here.

Q. What other knowledge would you have of the practice in ports of Mexico as to such items you mentioned, a [1174] general knowledge?

The Court: He said that is the only knowledge he would have, would be a general knowledge, and he has explained why it was very general.

Q. Referring, please, to item 44 on Identification A-9, have you any knowledge of what the standard and customary fees for the services of an agent are for a ship calling at a Mexican port?

A. To my knowledge, there is no standard scale. Often it is a matter of negotiation.

Q. Do you have any knowledge of the range of what the cost might be for such services at a Mexican port?

A. Again, I would say it is to protect our own-

(Testimony of Craig Wallace.)

ers. It would be a matter of negotiation, because I think there is almost no limit, probably, that they could charge, couldn't they?

Q. Referring to item 44 and the charges shown therein, can you state whether that is a reasonable charge for agency services?

Mr. Hokanson: I object to that. He has testified he doesn't know about Mexican charges.

Mr. Howard: He stated it is a matter of negotiation between the owner and the agent, which seems to me affords a basis for this witness to state whether this particular charge is reasonable. If it is a matter [1175] of negotiation, he has some basis on which he might be able to express an opinion. At least, I think the witness should indicate whether he can express an opinion.

The Court: The objection is overruled.

A. Well, in my opinion, I would say that this is a reasonable charge.

Q. Were you acquainted with the Tanker Urania in August, September or October of 1948?

A. Yes.

Q. What connection, if any, did you have with that vessel?

A. The vessel was handled by the department of which I am in charge. I wasn't doing most of the work on her.

Q. During that time, did you make any negotiations or participate in any way with any efforts to secure employment for the vessel?

A. Yes, we did, because that is in the depart-

(Testimony of Craig Wallace.)

ment I am in. We looked for what cargo we could find. We found almost none, but we did have one inquiry.

Q. What negotiations did you make or action did you take to secure employment for the vessel?

A. We had an inquiry for a twelve months' time charter for a vessel of this type and this size. The owner of the vessel was with me at the time. I showed him the inquiry. He was interested. We endeavored to negotiate and bring it [1176] to a conclusion.

Q. Tell us what time this was this inquiry came in.

A. To the best of my knowledge, it was the last days of September.

Q. Will you state what, if any, price was considered for the time charter of the vessel on this inquiry that you had?

Mr. Hokanson: That is objected to as leading; and moreover, irrelevant.

The Court: That is sustained.

Q. Was any price discussed for the time charter of the vessel on this inquiry?

Mr. Hokanson: That is objected to as irrelevant.

The Court: Overruled.

A. Upon showing the owner the inquiry, his opinion was that a charter hire of $16,000 per month would be acceptable to him.

Q. That was for a twelve months' period?

A. Yes.

(Testimony of Craig Wallace.)

Q. On the basis of that, do you have any knowledge of what the net profit would be to the owner, per month?

Mr. Hokanson: I object to that. He hasn't established all the factors here that are necessary to form an opinion.

The Court: That is sustained. [1177]

Mr. Howard: If the Court please, this witness has testified that in his business it is necessary for him to have a general knowledge as to what the prime cost of operation of a vessel is for the purpose of determining the charter rates.

The Court: He hasn't shown what trading routes were in mind, what was considered, whether or not the location of routes, distances, ports of call and other factors would enter into it, and if so, to what extent and how that might influence his judgment. The objection is sustained.

Q. What particular employment was considered on this time charter of this vessel?

A. The employment considered was the molasses trade between the Philippine Islands and Japan.

Q. Under a time charter, what is the practice with respect to the payment to the owner? I will ask you what the practice is with respect to payment to the owner?

A. The owner is paid hire at the agreed rate, monthly or semi-monthly in advance depending upon negotiations.

Q. Is the hire suspended for periods while the

(Testimony of Craig Wallace.)

vessel is not actually engaged in the transportation of cargo?

Mr. Hokanson: Objected to as leading.

The Court: Sustained.

Q. Is there any suspension in the payment of charter [1178] hire under a time charter?

Mr. Hokanson: Objected to as leading.

The Court: Overruled. Yes or no is the proper answer.

A. There can be.

Q. Under what circumstances?

A. If the vessel is unable to fulfill her warranty, so to speak, of the charter; in other words, broken down.

Q. After this inquiry came in and you discussed it with the shipowner in the last days of September, what if anything transpired with respect to the fixing of this vessel for employment?

A. The vessel was never fixed. Apparently the details on the other side were too complicated and the potential charterer could not clarify them with his principals.

Q. State, if you can, over what period of time the negotiations for this time charter that you have referred to extended?

A. To the best of my memory, we had a cable on the 3rd of November that the matter was to be dropped, a cable from Manila.

Q. Prior to that time, had you received any indication from the proposed charterer as to his willingness to accept the vessel at the rate quoted?

(Testimony of Craig Wallace.)

Mr. Hokanson: Objected to as leading. [1179]

The Court: Overruled.

A. We had a cable about the middle of October, the only cable that mentioned price, and it said that the charterer——

The Court: You cannot state what the cable said. Where is it?

Q. Do you have the cable with you?

A. I have a copy of it.

Q. Will you produce it, please?

Mr. Howard: I would like to have that marked for identification, if the Court please.

(10-13-48 cable marked Respondent's Exhibit A-26 for Identification.)

RESPONDENT'S EXHIBIT A-26

[In ink]: Del Manila if cargo to PI arranged 14,000 Redel St.

SFA005 Intl SF Manila Via Globe 17/16 13 405P
1948 Oct 13 AM 6 42

LC Gencharter—General SS 1211

Seattle Wash

Your Eleventh Urania Parsons Only Interested Maximum 12500 Dollars Delivery Redelivery Manila.

SUGARCRAFT.

Rejected.

(Testimony of Craig Wallace.)

Q. Handing you Identification A-26, can you state what that is?

A. That is a cable from our agents in Manila, a copy of a cable.

Q. Dated when?

A. Dated October 13, 1948.

Q. What does it relate to?

A. It relates to the negotiations that we were endeavoring to work out for the charter of this particular vessel Urania.

Q. Does that cable contain any reference to the proposed charter agreement price for time charter?

Mr. Hokanson: That is objected to; the document speaks for itself. Moreover, the document has not been offered in evidence, Your Honor.

Mr. Howard: I will offer it right now.

Mr. Hokanson: I don't see that he can testify concerning it until it has been.

Mr. Howard: I will offer it now.

Mr. Hokanson: I object to the admissibility of the cable on the ground that it is irrelevant here. No connection has been established between this document and this line of testimony and the claim of cross-libelant in this proceeding.

Mr. Howard: One of the elements of our claim, contained in page 3 of the cross-libel, is an item: loss of profits during certain periods of detention. I am endeavoring to prove by this witness what this vessel might have earned if it had been available on certain dates.

(Testimony of Craig Wallace.)

Mr. Hokanson: The witness has already stated that negotiations were had and that the particular proposed charter was rejected, and on that ground, I submit anything further relating to this particular negotiation is wholly irrelevant on the question of profit.

The Court: Has it been explained why it was rejected? Was it rejected because of some better opportunity which was accepted?

Mr. Howard: I will ask the witness that question now.

Q. What was the reason for the failure of negotiations as to this charter, if you know?

A. I am quite sure that it was the failure of the potential charterers to work out their molasses contract with the SCAP in Japan.

Q. Prior to the failure of these negotiations, had the proposed charterers of the vessel indicated any price that was agreeable to them for the charter of the vessel? A. Yes.

Q. In what manner was that communicated to you?

A. It was communicated by a cable in which they express interest at a certain figure.

Q. Is that the cable that is now identified as A-26? A. Yes.

Mr. Howard: I now offer A-26.

Mr. Hokanson: Same objection, Your Honor.

The Court: The objection is sustained.

It seems to me that what finally developed in con-

(Testimony of Craig Wallace.)

nection with this inquiry, the opportunity which was thought to exist did not, in fact, exist. It turned out not to exist. It was a prospect, but not a fact.

That is the way it seems to me, Mr. Howard. I make that comment so that you will understand the basis of the Court's ruling.

Mr. Howard: I understand that, if the Court please, but I do wish to point out in connection with the Court's ruling that this witness has testified that the charterer has indicated willingness to pay a certain price for the vessel, but the witness has now stated that because of failure to secure approval of SCAP, that they were unable to conclude the arrangements for the charter.

I therefore submit to the Court that this document, A-26, does cast some light upon what a charterer would be willing to pay if he had been able to conclude the necessary arrangements with the Government authorities, and that it should be admitted for the purpose of showing what a charterer had indicated willingness to pay for the use of this vessel on a charter basis.

The Court: In view of all the witness' testimony, the Court is of the opinion that the prospect was an unsubstantial prospect. Therefore, the objection is sustained.

Q. Did you have any further negotiations after this telegram that you have referred to concerning the employment of the vessel Urania?

(Testimony of Craig Wallace.)

A. We continued to try to work here, as I said before, for this particular business. [1183]

Q. When did your negotiations in that respect conclude?

A. As I remember, it was the 3rd of November.

Mr. Howard: I have no further questions.

Mr. Hokanson: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Howard: Mr. Antippas.

The Court: Mr. Antippas has already been sworn. He will resume the stand.

DEMETRI ANTIPPAS

was recalled as a witness by and on behalf of respondent, and having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Howard:

Q. Mr. Antippas, calling your attention to the period during which the Tanker Urania was at Winslow, Washington, for repairs in August, September and October of 1948, did you at that time have any discussion with representatives of Commercial Ship Repair as to extension of time on the completion of the contract work? [1184]

Mr. Hokanson: That is objected to as having

(Testimony of Demetri Antippas.)

been already covered by this witness in his previous testimony, Your Honor.

Mr. Howard: This witness has not been called on cross-libelant's case in chief. It may have been touched upon on the answering case of the claimant shipowner.

The Court: If the testimony has already been given, why have it produced a second time? It is before the Court.

Mr. Howard: It seems to me, Your Honor, that we should have the privilege or opportunity of establishing it or clarifying that testimony at least once on the case in chief of the cross-libelant. I am not satisfied that we went into that matter in sufficient detail in the answering case on the libel.

The Court: How many such instances do you expect to occur in respect to witnesses previously called?

Mr. Howard: This is the only instance, Your Honor, that I know of.

The Court: You may inquire.

Mr. Hokanson: Before he answers, Your Honor, I don't think the time has been established, and I would like the reporter to read the question.

(Last question read by reporter.)

Mr. Hokanson: I object to the question as leading. [1185]

The Court: Overruled.

Q. Answer yes or no. A. Yes, I did.

Q. When did you have such a discussion, if you recall?

(Testimony of Demetri Antippas.)

A. Yes, I do recall. It was on August the 4th or 5th, I believe the day that we came to an agreement on the bids with Mr. Antippas in his office.

The Court: August when?

The Witness: Either the 4th or 5th, Your Honor, and the ship was not at Winslow yet. It was still at the Foss Mooring.

Q. State your best recollection of the conversation that you had with Mr. Black at that time.

A. Well, I read the letter which was presented to me and the bid form, which included 18 working days as the time required to complete the original bid, and I remarked that I would be lenient as to the duration of the work, because I did not want to rush them. I indicated that I would not object to a few more days added to the 18 working days as stipulated.

Q. Did you have any further or subsequent conversation with Mr. Black or other representatives of Commercial Ship Repair regarding the time for completion of this job? A. I did not.

Q. Mr. Antippas, after the libel of the vessel and the [1186] release of the vessel on posting of bond, what orders were given by the shipowner to the master of the vessel as to where the vessel was to proceed?

Mr. Hokanson: Objected to as having been already covered in previous examination of this witness.

(Testimony of Demetri Antippas.)

The Court: Read the question, Miss Reporter.

(Last question read by reporter.)

Mr. Hokanson: I withdraw the objection on that ground. I believe it has not been covered.

The Court: Proceed.

A. The captain as instructed to proceed to Panama for further orders.

Q. Upon departure from Winslow was any cargo carried aboard the Tanker Urania?

A. None whatsoever.

Q. Was any cargo loaded aboard the Tanker Urania at any Pacific Coast port? A. None.

Q. At the time of the breakdown of the vessel on October 26, 1948, was there any cargo carried aboard the vessel? A. None.

Q. Mr. Antippas, have you had an opportunity to examine Exhibits A-12 and A-13, consisting of engineroom logs of the Tanker Urania covering the period from July 30 [1187] through a late date in 1948? A. Yes, I have.

Q. Will you state, please, whether there are any entries in the engineroom log in Greek or English relating to the manner in which the main engine performed prior to October 26, 1948?

The Court: Will either side in some concrete form undertake to show by the evidence how much is unpaid on the libelants' claim and how much is claimed on the respondent's cross-libel?

Mr. Howard: Yes, Your Honor. I am prepared to do that.

(Testimony of Demetri Antippas.)

The Court: I wish both sides would have that in mind. It might serve as a convenience to the trier of the fact to have some concrete testimony upon both of those issues in addition to any that may have already been offered. A stipulation would suffice, of course, at any time during the trial.

Mr. Howard: We will undertake to reach a stipulation on that, Your Honor.

Will the reporter read the last question, please?

(Last question read by reporter.)

A. Yes, there are.

Q. What are those entries, please?

A. This log book—— [1188]

The Court: Which one?

The Witness: This engineroom log book.

The Court: Is it in evidence?

Mr. Howard: Yes, it is, Your Honor.

The Court: As what number?

The Witness: It is Exhibit A-12 I am referring to now.

A. There are columns with English headings referring to the performance and temperatures of the main engine, and there is also a part here which refers to incidentals; adjustments of machinery, repairs, remarks, etc., in which the entries are made in Greek.

Q. What page of the log are you looking at now?

A. I am looking at the page dated October 15, on the day the vessel sailed.

Q. Will you turn to the following pages and

(Testimony of Demetri Antippas.)

examine the next few entries under the column of remarks?

The Court: Name the date.

Q. On the 16th through the 25th of October, 1948? A. I have looked at it.

Q. Can you summarize for us the entries under the column of remarks during that period with respect to the functioning of the main engine of the Tanker Urania?

Mr. Hokanson: I object to that, Your Honor; "summarize the entries"—— [1189]

The Court: The objection is sustained. You will have to let him read the entries.

Q. Start on October 16th. What is the entry for that date?

A. The entry for that date has the pressures given. Do you want me to read them?

Q. Just under the column remarks.

A. It says, "Vessel arrived at Port Angeles at 4:50. Stopping of engine. Damage of electric steering gear. Repair of steering gear by shipyard workers. Departure hour, 2025, 290 revolutions per minute."

Q. The next page, please. This is October 17?

A. This is October 17.

Q. The entry under remarks?

A. "Main engine and auxiliaries operating normally."

Q. October 18, any entries under remarks?

A. "Main engine and machinery and auxiliary machinery operating normally."

(Testimony of Demetri Antippas.)

Q. October 19?

A. "Main engine and auxiliary machinery operating normally."

Q. October 20th, under remarks?

A. "Main engine and auxiliary machinery operating normally."

Q. October 21? [1190]

A. "Stopping of main engine at 1630. Repacking of fuel pump."

The Court: What time is that?

The Witness: 4:30 p.m., Your Honor. "Repacking of fuel pump. 1720"—which is 5:20—"full ahead."

Q. The next date?

A. October 22. "Main engine and auxiliary machinery operating normally."

Q. October 23?

A. I am sorry, I have a remark here which I did not read on the 21st, which refers to changing of oil, of lubricating oil of starboard main generator.

The Court: Changed lube oil?

The Witness: Of starboard main generator.

Q. On October 21? A. Yes.

Q. This last entry you read as to repacking the fuel pump, was that on October 22?

A. No, that was October 21.

Q. October 22, entries under remarks?

A. "Main engine and auxiliary machinery operating normally."

Q. October 23?

(Testimony of Demetri Antippas.)

A. The same thing, "Main engine and auxiliary machinery operating normally." [1191]

Q. October 24?

A. October 24, "Main engine and machinery operating normally. 8:40 p.m., stopping of engine for tightening of packing installed in fuel pump. 8:50 p.m., full ahead."

The Court: At 8:40, was it?

The Witness: "Main engine and auxiliary machinery operating normally. 8:40 p.m., stopping for tightening of one packing in fuel pump. 8:50 p.m., full ahead."

The Court: One packing where?

The Witness: Of fuel pump.

Q. The next date, any entries under the column remarks, and the date, please?

A. "Main engine and machinery operating normally" on October 25. "At 7:30 p.m., changing of lubricating oil of main engine."

The Court: Will you repeat that again? What happened on October 25th?

The Witness: "Main engine and machinery operating normally. At 7:30 p.m., changing of lubricating oil of main engine."

Q. Will you turn to the next page? What entries under the column remarks, if any?

A. On October 26, "Revolutions of main engine oscillating. 3:20 p.m., revolutions of main engine reduced."

Q. Was that 3:20 p.m. or 320 r.p.m.? [1192]

(Testimony of Demetri Antippas.)

A. 3:20 p.m., the hour.

The Court: The main engine?

The Witness: "Main engine reduced and detection of knocking." "Stopping of engine for examination. Dismantling of governor and vertical shaft. Findings: wornout lower timing gears, causing poor operation of engine."

The Court: Will any logbook entry show where the vessel was on this 26th day when these things happened?

Q. Would you refer to——

A. It is not finished—there is some more in the remarks. "Impossible continue at normal speed. Proceeding reduced r.p.m. 150 to nearest port for repairs providing engine holds out. 11:30 p.m., in motion." That is all, Your Honor.

Q. Mr. Antippas, will you refer now to A-8? Will you examine the entries in A-8 for October 26th and state whether the position of the vessel is recorded as of the time of the breakdown?

A. Yes. It is marked here under 1520, Tuesday, October 26, 1948.

Q. What does the log entry under A-8 show as to the position of the vessel as of that date and hour?

A. Should I give you just the position, or do you want the whole entry of the log? [1193]

Q. Is it in English or Greek?

A. It is in English.

The Court: In ordinary parlance, what is the hour on October 26th?

(Testimony of Demetri Antippas.)

The Witness: 3:30 p.m., sir.

Q. Read the entire entry.

A. It says, "Stopped the engine to clean filters. Chief engineer discovered that gear of vertical shaft thrust bearing and gear of vertical shaft drive are galled. Ship's engineer trying to do something. Latitude, 18 degrees, 15 minutes north. Longitude, 104 degrees, 24 minutes west. At 1930"—which is 7:30—"we called up the owners in New York by ship's radiotelephone and ordered us, as soon as the chief engineer fixed temporarily the above gears, proceed Los Angeles, California."

The Court: Does that purport to record what the owners instructed? If so, state what the owner is there recorded to have instructed.

Q. What is recorded there in the log as the instructions from the owner?

A. We instructed the captain to proceed to the nearest American port, which was Los Angeles, California.

Q. Does that conclude the entries in Exhibit A-8 for October 26?

A. No, there is some more. [1194]

Q. Would you read the rest?

The Court: What port was that? The nearest port?

The Witness: The nearest American port, the nearest United States port.

The Court: And the comment of the one making that entry is "which was Los Angeles"?

(Testimony of Demetri Antippas.)

The Witness: "Proceed to Los Angeles, California."

Q. Does that show in the log?

A. No. I discussed this with the captain myself on the telephone, and I asked him what was the nearest——

Mr. Hokanson: Be responsive to the question.

Q. Will you continue with the entry in the log for that date?

A. "At 2330"—11:30 p.m.—"engine started running 145 r.p.m., changed course to 297 true, proceeding to Los Angeles."

Q. Turning to the entries in the deck log, Exhibit A-8, for the next day, are there any remarks noted there?

A. Yes. On Wednesday, October 27, 1948, at 4 a.m.—do you want me to read it?

Q. Yes, please.

A. "Partly cloudy and light west-northwesterly breeze. Moderate swell. Engine runs at half speed, r.p.m. 150."

Mr. Hokanson: May I interrupt to ask the witness one question? Are these entries written in English? [1195]

The Witness: That is correct. They are.

Mr. Hokanson: I wonder if we couldn't shorten this, Your Honor. The entries are written in English and they are available for inspection purposes if counsel has some particular data——

(Testimony of Demetri Antippas.)

The Court: I didn't know what the purpose was. Proceed.

Q. Will you refer now to Exhibits A-12 and A-13 for October 27th? Are there some entries under the column remarks for that date?

A. October 27, 1948?

Q. Are they in Greek? A. Yes.

Q. Will you give us a translation of that, please?

A. "Engine functioning irregularly and with reduced r.p.m. 150-151. Auxiliary machinery operating normally."

Q. Any further remarks? A. That is all.

Q. Mr. Antippas, are you acquainted with the temperatures and pressures normally experienced and prescribed by the manufacturer for the operation of the main Union Diesel engine installed aboard the Tanker Urania? A. Yes, I am.

Q. Will you refer back to the engineroom log entries on A-12 and A-13 for the period from October 16 through [1196] October 25th?

A. I am referring to Exhibit A-12 on October 15, the day the vessel sailed from Bainbridge Island.

Q. Have you examined the entries shown there as to the temperatures and pressures recorded in the engineroom log? A. Yes, I have.

Q. Can you state whether the temperatures and pressures as recorded in A-12 are within the normal operating range prescribed for the main engine of the Tanker Urania? A. They are.

Q. Are there any exceptions to that for the period that I have mentioned?

(Testimony of Demetri Antippas.)

A. I will have to look through it.

Q. That is, through October 25?

A. Nothing that would be outside of the ordinary operation of the main engine.

Q. You have had an opportunity to check these entries over prior to the time that you took the stand? A. I have.

Q. During the period from October 16 through October 25, did you have any occasion to talk with the master or chief engineer of the Tanker Urania?

A. I did.

Q. How was that conversation carried on?

A. By radiotelephone. [1197]

Q. When were those conversations?

A. Every day.

Q. State what if any report was received from the master or chief engineer of the Tanker Urania by radiotelephone conversation between October 16 and October 25 with respect to the manner of performance and function of the main engine of the Tanker Urania.

A. The main engine was operating satisfactorily without any apparent cause for alarm.

Q. Where were you on October 26?

A. In New York.

Q. State what if any notice you received of difficulties encountered by the Tanker Urania.

A. It was October 26, I believe, about 9 or 9:30 New York time. I received a telephone communication from the master informing me that the vessel was stopped for several hours.

(Testimony of Demetri Antippas.)

Q. Was that morning or evening?

A. That was 9:30 p.m., and I was given to understand they had just discovered what the trouble was, and it was reported to me that the vessel had developed wornout lower timing gears for the main engine.

Q. What instructions did you communicate to the master of the vessel at that time, if any?

A. I discussed the matter thoroughly with him, trying [1198] to find what the nearest port would be, and he informed me that the nearest United States port, which I asked him to check for me, would be Los Angeles, and I instructed him to proceed to Los Angeles.

Q. What if any further conversations did you have with the master after this one you have just referred to?

A. The next morning I received another telephone call, and I was informed—or rather, the chief engineer informed me that it was not possible to continue the run to Los Angeles, because in the first place the gears were wearing out fast, and in the second place it would have been a hazardous trip under the conditions stated by the captain.

Q. Did you give any further or revised instructions to the master or chief engineer of the vessel on that occastion? A. Yes, I did.

Q. What were they, please?

A. I informed the captain to proceed to the nearest port to him at that time, and he told me he

(Testimony of Demetri Antippas.)

could see the Manzanillo lights, and he informed me they were about 60 or 65 miles and they would try to make it into Manzanillo.

Q. What if any further action did you take at that time or after that time with respect to the repair of he engine on he Tanker Urania?

A. The chief engineer had given me the numbers as listed—I mean, the description of the parts which were [1199] wornout and also the reference numbers as in the operating manual.

Q. By the way, did the Tanker Urania have a main engine operating manual aboard?

A. Yes, and I had translated most of it in Greek.

Mr. Hokanson: I object to the latter part of his answer as not responsive.

The Court: Overruled.

A. Yes, they did have that manual, and from that manual I was given the description and reference numbers of the parts in question.

Q. Who gave you those, please?

A. The chief engineer.

Q. By radiophone? A. That is correct.

Q. Then what action did you take?

A. I immediately contacted The Union Diesel Engine Company in Oakland, California, and I discussed the matter with Mr. Newell.

Q. What arrangements did you make for assistance from the Union Diesel Engine Company, if any?

A. We arranged with Mr. Newell that he was

(Testimony of Demetri Antippas.)

going to dispatch his best service engineer down there with the spare parts and try to do something for the vessel, to come to Los Angeles for a final checkup or final repairs on the [1200] vessel.

Q. Was that done, to your knowledge?

A. Yes. We performed the temporary repairs and the vessel proceeded for Los Angeles.

Q. After these repairs had been performed at Manzanillo, did you receive any further word from the vessel as to any difficulty? A. Yes.

Q. What word did you receive?

A. I did receive another call from Mr. Cross. I was in constant communication with Mr. Cross, who was the service engineer on board the vessel, and I don't recall the time or date exactly. I would say it was approximately 36 hours after the vessel sailed, but I received a communication that the lower timing gears were wearing out again.

Q. What instructions did you give to the master or Mr. Cross by radiophone at that time?

A. I instructed both the master and Mr. Cross that I was going to dispatch a tug to tow them, as further operation of the engine might have proved injurious to the engine, and I doubt very much that they could have made it on that engine to Los Angeles.

Q. Had you received any report from the master or Mr. Cross at that time as to whether it was possible to [1201] continue the operation of the main engine until the vessel arrived at Los Angeles?

(Testimony of Demetri Antippas.)

A. Well, not to Los Angeles. They definitely stated they wouldn't undertake to take the vessel to Los Angeles under her own power.

Q. What action did you take to arrange for a tug?

A. I contacted Simpson, Spence & Young in New York, who are our agents, and with whom we deal every day, and they in turn contacted the General Steamship agency in San Francisco, I believe—no, it was in Los Angeles, and arrangements were subsequently made for towage of the vessel.

Q. Do you know whether that was a negotiated price on the towage, or was it a matter of bids?

A. That I don't know, if it was bid or on negotiation. I know that I approved the price that was presented to me as the best available.

Q. Mr. Antippas, did you go out to Los Angeles to meet the vessel out there?

A. Yes. I went to Los Angeles prior to the vessel's arrival.

Q. You were there when she arrived?

A. I was there before she arrived.

Q. What arrangements did you make for repair of the main engine after arrival of the vessel at Los Angeles?

A. I had already arranged with Mr. Newell, after also [1202] consulting with Mr. Cross on the matter, to have some more Union Diesel Engine men to come down there with necessary spare parts to perform a general checkup of the engine to deter-

(Testimony of Demetri Antippas.)

mine the actual cause of the breakdown, and of course, to remedy such causes.

Q. Did you participate in any way in the servicing or inspection of the main engine aboard the vessel?

A. I was there every day and present at everything that was carried out.

Q. Who arranged for Mr. Pike to be present and attend aboard the vessel?

A. I informed General Steam in Los Angeles that the vessel was under American Bureau classification, and conforming to the regulations of the Bureau, that it would be necessary to have Mr. Pike present.

Q. Who arranged for Mr. Dupuy to be present?

A. It was arranged in the same manner by General Steam after indication that our underwriters were London Salvage.

Q. Mr. Summers was representing the owners themselves?

A. That is correct. Mr. Summers was retained by me through General Steam.

Q. Mr. Antippas, are you acquainted with the lubricating oil cooler that was installed aboard the Tanker Urania? A. I am.

Q. Will you state if you know what the test pressure [1203] specified by the manufacturer is for the salt water side of the lubricating cooler which was installed aboard the Tanker Urania at the time

(Testimony of Demetri Antippas.)

it was at Winslow and at the time of the breakdown in 1948?

A. That was 300 pounds per square inch.

Q. How do you know that?

A. It is stamped on the casing of the engine.

Q. How do you recall the stamping on the casing of the engine?

A. I saw this cooler quite recently.

Q. How recently? A. Yesterday.

Q. Where is the cooler now?

A. It is in the offices of General Steamship Corporation in Seattle.

Q. Can you give us some idea as to the weight of that cooler?

A. Approximately 150 pounds.

Q. Will you refer again, please, to the engine-room logs for this period, Exhibit A-12, and state if there is any reference in the engineroom logs to the employment of a standby fire pump in connection with the cooling or circulating system aboard the vessel between the period October 15 and October 26, 1948?

A. Yes. I was referring to that Exhibit 12. There [1204] is no such mention in Exhibit 12 between the periods of October 15 and October 26 as to the use of any standby pump for cooling, for assisting of cooling.

Q. As an officer of the owners' corporation, do you know of your own knowledge what the practice was with respect to the use of a standby fire pump

(Testimony of Demetri Antippas.)

aboard the vessel Urania? A. Yes, I do.

Q. State what that was, please.

Mr. Hokanson: Your Honor, as an officer he has no better information on that than he would have if he were a third party. It must be within his own knowledge. I don't see that being an officer of the company gives him any higher knowledge of that subject in and of itself. He wasn't on board the vessel.

Mr. Howard: I didn't want to take the time of the Court to review this man's qualifications as an engineer and the education he has had, nor his position with the company, which has already been testified to when he was called previously to the stand.

The Court will recall this man is a graduate engineer from a university in England and had a post-graduate course at MIT in naval architecture and engineering. He has testified he was operating engineer of the company owning this vessel, as well as an officer. [1205]

On the basis of that experience and with the position he has already testified he had with the company, it seems to me it is quite possible that this man might be able to cast some light as to what if any instructions or arrangements the owners had with the chief engineer or personnel aboard this vessel with respect to the use of a standby fire pump that has been testified to by others and has been raised by cross respondent in his cross-examination

(Testimony of Demetri Antippas.)

of numerous witnesses in California depositions.

The Court: The objection is overruled.

A. Yes, I do know what was done with that pump.

Q. Will you state what that practice was, please?

A. There was no need to use that pump.

Q. State what the practice was.

A. That pump would be used only in case the engine would overheat due to improper function of the water coolers, and then that pump, which is permanently installed and piped to the main engine, would be put in operation to activate the flow of sea water through the water cooler in order to effect better cooling.

Q. Will you refer once again, please, to Exhibit A-12 and state whether any entries are made during this period of October 16 to October 25 as to the temperature of lubricating oil in and out of the lubricating oil cooler? [1206]

A. I have looked at this exhibit before, and I noted that all of the temperatures of lubricating oil were normal.

Q. There are entries in A-12——

A. There are entries every day of the operation of the engine between Octobr 15 and October 26.

Q. Have you checked those entries?

A. Yes, I have.

Q. Are they within the normal operating range of temperature of the lubricating oil?

A. Very much so.

(Testimony of Demetri Antippas.)

Q. Do you know from your education and your experience what the effect would be of leaks in a lubricating oil cooler where two fluids are running, separated by tubing, at different pressures?

A. In reference to the lubricating oil cooler?

Q. Yes.

A. It is quite possible for the sea water to penetrate into the lubricating oil side of the cooler and contaminate the lubricating oil.

Q. Assume that the pressure on the lubricating oil side of the cooler is higher than the pressure on the salt water side of the cooler?

A. As referred to in this case, it is quite possible for the water to get into the lube oil; that means from the salt water side to get into the lubricating oil side, for [1207] two reasons.

Q. What are those reasons?

A. The first one is that the pressures are not constant at all times, and they vary according to the operation and the various conditions; and the second reason is a scientific one which is explained very clearly under Bernouilli's "Theorem in Applied Mathematics." It is an accepted theorem in applied mathematics which guides the principles of flowing liquids.

Q. Very briefly, and in lay language, if possible, will you describe Bernouilli's theorem?

A. I will try to. Actually, the energy of a flowing liquid at any point has four factors which affect its actions; in other words, which affect the way

(Testimony of Demetri Antippas.)

in which such liquid is going to act.

These four factors are internal energy, which refers to the molecular activity of the oil or water or whichever liquid is in flow, and this molecular activity is explained in plain language as heat, the heat energy.

The second energy would be pressure energy, which is quite plain.

The third would be velocity energy, in which velocity—I mean, we would consider it in plain language as the speed of the liquid which is flowing through a particular tube or a particular chamber. In that velocity, [1208] of course, is included the last, because velocity is compounded by acceleration.

And fourth, we would have the potential energy of the liquid. All these four factors have a bearing on the actions of the liquid flowing through a tube or through a chamber, and any one of them being higher can make the total energy of a liquid a higher force.

Q. During the course of this trial, the factor of viscosity has been mentioned by some of the witnesses. Is that taken into consideration in this theorem?

A. Yes, very much so, it is. Viscosity would come under internal energy of the liquid, the molecular agitation, as I said before, and a viscous liquid in molecular agitation is much lower than a non-viscous liquid.

Q. Applying this theorem to the principle of

(Testimony of Demetri Antippas.)

operation of the lubricating oil cooler installed aboard the Tanker Urania, what bearing would that have on the possibility of salt water penetrating through small leaks, as described in the testimony you have heard, in the seal or core of the lubricating oil cooler into the lubricating oil on the other side?

A. It would have very much of a bearing.

Mr. Hokanson: I don't think that question asks him anything. It suggests some sort of an answer that has been worked out, possibly, but I don't know what [1209] the question is—what bearing—he hasn't established the conditions. What is he talking about?

Mr. Howard: If the Court please, that evidence is already before Your Honor. This witness has attended during the trial of this case and certainly has that in mind. I can, of course, go into the details to establish the facts that were existing—which have been testified existed in this heat exchanger at the time it was taken.

The Court: At this point, we will take a ten-minute recess.

(Recess.)

Mr. Howard: I will strike the last question.

Q. Mr. Antippas, what bearing or relation does Bernouilli's theorem have to the principle of operation of the lubricating oil cooler aboard the Tanker Urania, assuming higher pressure on the lubricating oil side of the cooler, and assuming leaks in the core

(Testimony of Demetri Antippas.)

of the lubricating oil cooler as has been testified to in this case?

Mr. Hokanson: I object to the question.

The Court: It is overruled.

Let us proceed rapidly in the remainder of this trial. We have been rather deliberate. I do not mean to abolish deliberation, but I mean to expedite the proceedings. [1210]

A. The higher velocity and the higher internal energy of sea water would overcome the higher pressure of the lubricating oil on the lubricating oil side of the cooler, and therefore would create leaks of salt water into the lubricating oil side.

Q. Have you checked the engine room log entries in A-12 with respect to adjustment of the timing or fuel controls of the main engine during the period October 15 to October 25? A. Yes, I have.

Q. Are there any entries showing any adjustments made in the timing or fuel controls during that period? A. None whatsoever.

Q. Handing you Identification A-15, were you present when the work contained in that exhibit was ordered? A. Yes, I was.

Q. Did you obtain an estimate of the cost of the work? A. I did.

Q. What was that estimate, please?

A. It was very close to the figure stated in here. I believe it was within ten or fifteen dollars of what is indicated.

(Testimony of Demetri Antippas.)

Q. Does your signature appear on that exhibit?

A. Yes, it does.

Q. Did you check to see whether the work covered by [1211] that exhibit was performed?

A. Yes, I did.

Q. What is the total amount shown on that exhibit? A. $678.86.

Q. What was your signature placed on that exhibit for? What was the reason for that?

A. Approving the cost and the carrying out of the repairs, supervision of that repair work.

Q. Has that amount been paid?

A. Yes, it has.

Q. By your company? A. Yes, it has.

Mr. Howard: I now offer A-15.

Mr. Hokanson: I object to its admissibility on the ground that it hasn't been established that all the items included therein were necessary to effect the repairs.

The Court: Namely, what items, for instance?

Mr. Hokanson: I don't have them. They were all testified to by the witness from the Clayton Boiler Company, and Your Honor expressed doubt at the time it was originally offered.

The Court: Originally, and at the time mentioned by objecting counsel, the items for certain parts, including some of those entering into the total amount [1212] of $395.40, were objected to as not being properly identified, properly established.

Mr. Howard: That is right, Your Honor.

(Testimony of Demetri Antippas.)

The Court: It seems to me that the same objection is tenable now.

Mr. Howard: I offer the exhibit with respect to the items that have been identified.

The Court: That is the services only?

Mr. Howard: That is right, Your Honor.

The Court: Less the $395.40 for parts?

Mr. Howard: That is right, Your Honor.

The Court: Insofar as Exhibit A-15 relates to services, the same is admissible. It is not admissible, in the Court's opinion, insofar as it relates to parts in the total parts cost of $395.40, so the Court does now admit A-15 only insofar as it relates to services, excluding all items thereon relating to cost of parts.

(Respondent's Exhibit A-15 received in evidence.)

Clayton Manufacturing Company

EL MONTE, CALIFORNIA

CUSTOMER

SOLD TO— M.S. Urania & Owners
c/o General Steamship Co.
P.O.Box 829 Attn: Mr. Hanrah
San Pedro, Calif.

SHIP TO— 15266

CAUSE 15266 Re-15

RESPONDENT EXHIBIT Re-15
SUBMITTED APR 14 1949
[illegible]

OUR ORDER NO. 12322

Please Return Completed and Attached Vouchers
General Steamship Corporation, Ltd.
541 South Spring St.
Los Angeles 13, Calif.

INVOICE NO. 75-8568
INVOICE DATE 11-18-48
DATE SHIPPED

TERMS 1% 10 days Net 30 days

SHIPPED VIA S/O 01123

FROM El Monte FOB

ACCOUNT	PRODUCT	SALESMAN
701 & 709	44	75

ON LIST PRICE LESS DISCOUNT

STOCK NO	DESCRIPTION	UNIT PRICE	QUANTITY ON ORDER	QUANTITY SHIPPED	AMOUNT
	To charge your account for repairs on generator, as follows:				
UR-6700	Diaphragm Washer	1.60	6	6	9.60
UR-6701	Diaphragm Collar	.45	6	6	2.70
UR-6734	Diaphragm Washer	1.70	6	6	10.20
7393	Seal	.48	6	6	2.70
7392	Seal	.80	2	2	1.60
7515	Bearing	5.90	3	3	17.70
7516	Bearing	4.95	4	4	19.80
7523	Thrust Bearing	3.15	2	2	6.30
7524	Thrust Bearing		1	1	1.65
7389	Fod. bearing		1	1	1.45
UR-1284	Crankshaft		1	1	45.00
JL-5248	Diaphragm	4.25	6	6	25.50
UR-1273	Yoke	26.00	3	3	78.00
UR-1282	Wrist Pin	1.55	3	3	4.65
UR-1283	Wrist Pin Bearing	.40	6	6	2.40
UR-1274	Conn. Link		1	1	9.80
UR-1279	Flange	9.95	6	6	59.70
UR-2142	Check Valve Housing	13.00	4	4	52.00
UR-2143	Housing Assy	13.50	2	2	27.00
UR-1276	Pump Head		1	1	5.65
UR-1499	Manifold Sleeve	.60	8	8	4.80
UR-1135	Stand Pipe		1	1	3.90
UR-1491	Stud	.45	8	8	3.60
					395.70
	Labor: 56.25 hours @ 4.50 per hour				253.13
	4 hours @ 6.75 per hour				27.00
					675.83
	Sales Tax on 395.70				9.89
					685.72
			rec'd	1%	6.86
					678.86

Claimants and Bros. Libelants Exhibit W-1 and W-2 for identification Geo. P. Hewitt, U.S.M.C. March 24, 1949.

Order Approved Check No. 85047
Amount 678.86
Charge to 120-60-1

DEC 1948 PAID CLAYTON MFG. CO. El Monte, Calif.

(Insert-12/3)

1396

SERVICE ORDER

Clayton Manufacturing Company

EL MONTE, CALIFORNIA

TELEPHONE FORDHAM 8-8501

CUSTOMER W-2 W.K.H.

No. 0112

TO Uranium General Stores Co

NAME

STREET ADDRESS

ORDERED BY McMANAHAN DATE ORDERED 11-[illegible]

CITY Long Beach STATE

RSM. NO. DATE WANTED

TELEPHONE NO. Terminal 31331 RSM. DATE DATE COMPLETED OR SHIPPED 11-16-[illegible]

VIA FROM CASH CHARGE

CUSTOMER	ACCOUNT	PRODUCT	SALESMAN

EQUIPMENT	MODEL	TYPE	SERIAL NO.	DATE INSTALLED

CUSTOMER TROUBLE INSTRUCTIONS Reported pump leaking around heads - water & crankcase etc.

Pump recently repaired - parts assembled incorrectly resulting in misalignment & crankshaft damage

WORK TAKEN Removed pump - disassembled - reassembled placing necessary damaged parts. Readjusted same & checked for water cutout [illegible]

RECOMMENDATIONS Operation, maintenance and repair procedures outlined in manual should be followed closely. Oil drain trap should be installed immediately.

NO.	DESCRIPTION OF PARTS USED	UNIT PRICE	QUANTITY	TOTAL
	Paper attached sheet			395.70

THIS SPACE FOR SERVICE DEPT. USE

[illegible] 1698.42

395.70

PARTS USED PER LIST		[illegible]
SALES TAX ON PARTS	%	4.11 [illegible]
LABOR 5.75	HOURS @ 4.00	253 [illegible]
LABOR [illegible]	HOURS @ 4.75	27 [illegible]
OVERTIME	HOURS @	
TOTAL CHARGES		[illegible]
TOTAL PAID		

PARTS USED

CUSTOMER'S ACCEPTANCE D. [illegible] Owner

NAME AND TITLE

WORK COMPLETED AND INSPECTED BY D. O. Bickler

SERVICEMAN

(Testimony of Demetri Antippas.)

Q. Referring you to Identification A-9, A-10 and A-11, are you familiar with the contents of those documents? A. Yes, I am.

Q. What do they represent?

A. They represent the port charges for two calls at the port of Manzanillo by our tanker, the Urania.

Q. From whom were those received by your company?

A. They were received from the agents at Manzanillo.

Q. Have the amounts shown on those documents been paid by your company?

A. Yes, they have.

Q. State what your practice is with respect to the payment of such accounts where they do not contain the approval of the master.

A. Some of the vouchers which do not contain the signature of the master are approved because the ship has left by that time, or because certain charges are standard practice in those ports. We are aware of such charges at various South American ports, especially, and Central American ports.

Q. State if you know whether the items contained on A-9, A-10 and A-11 all relate to charges incurred with the calls of the vessels Urania at the port of Manzanillo in October and November, 1948.

A. Yes, they do.

Mr. Hokanson: I object to that as not being within his own knowledge, since he wasn't present.

The Court: The objection is overruled.

(Testimony of Demetri Antippas.)

Q. Have those accounts been approved by your agent—— A. Yes, they have.

Q. ——at Manzanillo? [1214]

A. Yes, they have.

Mr. Howard: I now re-offer Identifications A-9, A-10 and A-11.

The Court: I would like to hear further testimony from the witness, if he has any further knowledge, regarding the nature of the expense involved in A-11. I have a notation that it was incurred in connection with carrying parts to the vessel.

Q. Do you have that before you now?

A. Yes, I do.

Q. Can you state what the items are covered by A-11?

A. It relates to a box of spare timing gears which had gone out on the vessel and which were sent by mail by Union Diesel Company to Manzanillo for the boat, and they missed the boat. They got it after the second time the boat called at that port.

Q. Were those actually put aboard the Tanker Urania? A. Yes, they were.

Q. When?

A. They were put on board during the second trip, I believe, I am not sure. I believe it is the second trip of the vessel to Manzanillo.

Q. Did you say those are spare parts?

A. They were the replacements for the broken-down timing gears of the vessel. [1215]

(Testimony of Demetri Antippas.)

Q. I understand, but after the new gears had been installed at Los Angeles, did these then constitute spare parts? A. That is correct.

Mr. Howard: On that basis, I withdraw my offer on A-11, if the Court please.

The Court: It seems to me that is proper, because it is not established that expense was a reasonable and normal consequence of any faulty condition in the repair job.

Mr. Howard: I therefore withdraw my offer on A-11. I have now offered A-9 and A-10.

The Court: The objection to them is overruled. Each of them, Respondent's Exhibits A-9 and A-10, is admitted.

(Respondent's Exhibits A-9 and A-10 received in evidence.)

Mr. Hokanson: Your Honor, may I read our objection into the record?

The Court: You may do so. I thought you had already stated your objection in the record.

Mr. Hokanson: Through this witness, Your Honor, this is compounding hearsay. Even the captain in his deposition didn't know of his own knowledge about these things and so admitted, and now they are attempting to [1216] introduce them through a witness who was 3,000 or 5,000 miles away from the captain.

In general, our grounds of the objection are, first, it is opinion as far as the reasonableness is concerned; second, they are self-serving documents;

(Testimony of Demetri Antippas.)

third, that the person who actually performed services in a situation such as this must testify except where the witness himself was present and saw the services performed; and that in general we feel the only proper person through whom these exhibits could properly be offered would be the agent who might be in a position to know if the accounts were reasonable and were actually done, or the captain who actually saw the work done—which was not his testimony—and therefore we object on the further ground of hearsay.

The Court: The theory on which the Court has admitted them is on what the Court believes is a reasonable inference from all the testimony received in connection with them, that they were paid by the cross libelant in the ordinary course of business, and it carries with it an inference that there was some investigation made by the company in the usual course of business as to whether they were proper items to be paid or not.

Mr. Hokanson: Your Honor, we feel that there should [1217] be more foundation before such an inference could be drawn.

The Court: The objection is overruled. The admission will stand as to those two exhibits.

(Invoice marked Respondent's Exhibit A-27 for Identification.)

Q. Handing you, Mr. Antippas, what has been marked for identification as A-27, do you know what that is? A. Yes, I do.

(Testimony of Demetri Antippas.)

Q. Were you present in Los Angeles when bunkers were replenished on the Tanker Urania?

A. Yes, I was right there.

Q. Did you see the oil put aboard?

A. Yes, I was right next to the hose.

Q. Can you state what A-27 is?

A. It is the quantity of oil necessary to replenish the bunkers of the Motor Tanker Urania which were expended from the time she left Seattle up to the time she departed from Los Angeles.

Q. What is the amount shown on that invoice?

A. $974.32.

Q. Has that amount been paid by your company? A. Yes, it has.

Mr. Howard: I now offer A-27.

Mr. Hokanson: It is objected to on the ground that [1218] there is no foundation laid here; the continuing objection heretofore made that there is no tie-up between this item and the work done by Commercial Ship Repair; and on the further ground that there is no testimony by the person furnishing the oil as to the reasonable value of the amount of oil set forth in the invoice.

The Court: The objection is overruled. Respondent's Exhibit A-27 is admitted. It is, however, without prejudice to the right of cross respondent to show whether it was all attributable to alleged improper repairs.

(Testimony of Demetri Antippas.)

(Respondent's Exhibit A-27 received in evidence.)

RESPONDENT'S EXHIBIT A-27

Invoice

Shell Oil Company

Incorporated

In Remitting Refer to
Invoice No.—H. O. 1576
Date November 24, 1948

M.S. "Urania" and Owners (and Charterers)
Compagnia Naviera Limitada
c/o Simpson, Spence & Young
52 Broadway
New York, New York
11-/17 1948

Delivered to M.S. "Urania" at Wilmington (San Pedro), California, ex-Wharf

283.75 barrels Shell Bunker Diesel Fuel
@ $3.35 per bbl..... $950.56
California Retail Sales Tax @ 2½%..... 23.76

$974.32

Attachments:
Marine Loading Ticket (3)

Admitted April 14, 1949.

Q. After the Tanker Urania had left Los Angeles, where did it next proceed?

A. She proceeded to a Gulf port.

(Charter marked Respondent's Exhibit A-28 for Identification.)

MARINE DEPARTMENT
30 ROCKEFELLER PLAZA
NEW YORK

CODE WORD FOR THIS CHARTER PARTY:

STANVOY
★ ★

NEW YORK, December 3rd, 1948

It is this day mutually agreed between COMPANIA NAVIERA LTDA. OF PANAMA

Owner of the good Panamanian Motor Tank Vessel URANIA (Flag) of about 24,700-73 tons net registered tonnage (about 34,000 tons gross) and classed as an assigned maximum freeboard and having a capacity of about 1,000 metric tons (of 2,240 pounds) total deadweight on a draft not to exceed ... feet ... inches on salt water on assigned summer freeboard, and having a capacity of 1,000 tons (of 2,240 pounds each) or thereabouts in bulk, now expected ready Sydney, N.S. about Dec. 16, 1948

and THE COASTWISE PETROLEUM COMPANY Charterer, as follows:

1.—The Vessel, classed as aforesaid and to be so maintained during the currency of this Charter, shall, with all convenient dispatch, proceed as ordered to

Sydney, N.S.

or so near thereunto as she may safely get (always afloat), and being tight, staunch and strong, and having all gears, pumps and boiler units in good working order, and being in every respect fitted for the voyage, as far as the foregoing conditions are applicable, and being so provided by the Owner, shall therewith proceed to ... and there load a full and complete cargo of 1,000 tons 10% more or less

quantity at vessel's option of Benzene (Benzol)

in bulk, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, stores and furniture (sufficient space to be left in the accommodation ladder to provide for the expansion of the cargo), and being so loaded shall forthwith proceed, as Charterer's option, as ordered on signing Bills of Lading, direct to

Philadelphia, Pa.

or so near thereunto as she may safely get (always afloat), and deliver said cargo on being paid freight in full as and after the rate of

Eight Dollars ($8.00) U.S. Currency

per ton (of 2,240 pounds) of Oil on intake quantity as shown on the Licensed Inspector's Certificate of Inspection, the services of the Petroleum Inspector to be arranged and paid for by the Charterer who shall furnish the Owner with a copy of the Inspector's Certificate. No deduction of freight shall be made for water and/or sediment contained in the Oil.

2.—The Charterer shall name the loading port or ports twenty-four (24) hours prior to the Vessel's readiness to sail from the last previous port of discharge, or from her homeward port for the voyage, or upon signing this Charter if the Vessel is already sailed. Any extra expenses incurred by reason of the Charterer's delay in furnishing loading port orders shall be paid for by the Charterer, and any time thereby lost to the Vessel shall count as used lay time.

3 Lay time shall not commence before the 15th day of December, 1948 and should the Vessel not be ready to load by 4:00 o'clock P. M. (local time) on the 24th day of December, 1948 the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty-four (24) hours after such cancellation date; otherwise this Charter to remain in full force and effect.

4.—The Master or his representative shall give the Charterer or his agent at the ports of loading and discharge notice in writing during ordinary business hours that the Vessel is ready to load or discharge cargo, berth or no berth, and lay time shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (if, e.g., finished mooring when at a reloading or discharging terminal, and all fast when loading or discharging alongside a wharf), whichever first occurs. If notice of readiness is given at 4:00 P. M. (local time) or earlier, the six (6) hours shall be continuous hours; but if after 4:00 P. M. the six (6) hours shall be daylight hours, daylight being between sunrise and sunset.

5. 48 running hours (Sundays, holidays and Saturday afternoons excepted unless used), weather permitting, shall be allowed the Charterer as lay time for loading and discharging cargo; but if the Vessel's condition or facilities do not admit of loading and discharging in the time allowed, then the additional time necessary thereafter shall be included in lay time. If regulations of the Owner or port authorities prohibit loading or discharging of the cargo at night, time as last shall not count as used lay time; if the Charterer, Shipper or Consignee prohibits loading or discharging at night, time so lost shall count as used lay time.

6. The Vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and secured by the Charterer, and where she can safely lie afloat, any lighterage being at the expense, risk and peril of the Charterer. No petroleum or its products having a flash point under 180° Fahrenheit (tested Cup Abel Test) shall be loaded from lighters but this clause shall not restrict the Charterer from loading or topping off Crude Oil from vessels or barges inside or outside the bar at Carupito Venezuela and Tampico, Mexico. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all expenses incurred, except as noted in Clause 15 hereof. Time consumed on account of shifting shall count as used lay time, except as noted in Clause 7.

7.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out Vessel at the expense, risk and peril of the Vessel only as far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee. Vessel after discharging is to clear shore pipe lines of Oil or Sludge to be pumped by pumping water through them if required by Charterer (lay time consumed for this purpose to count as used lay time. The Vessel shall supply her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as pumpmen, engineers and watchmen. Should regulations not permit fires on board the Charterer or Consignee shall supply, at its expense all steam necessary for discharging as well as heating, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel.

8. The Freight shall be paid on the quantity delivered, as per Bill of Lading, less any disbursements or advances made to the Master or Owner's agents at ports of loading and/or discharge, in cash without discount, at the current rate of exchange on ... [illegible] ... Charterer in cash without discount at the current rate of exchange on demand, and the balance of freight upon delivery and right discharge of cargo, the rate of demurrage and costs of insurance thereon ... [illegible] ... Cash shall be advanced to the Master or Owner's agents, if required, for ordinary disbursements at ports of loading and/or discharge at current rates of exchange.

9.—Should the Charterer fail to supply a full cargo, the Vessel may at the Master's option, and shall, upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. In that event, however dead freight shall be paid on the difference between the quantity loaded and the quantity the Vessel would have carried if loaded to her minimum permissible freeboard for the voyage.

10.—Charterer shall pay demurrage day by day at the rate of $ 25.00 per running hour and pro rata for part of a hour for all time that loading and discharging and used lay time as elsewhere herein provided exceeds the allowed lay time herein specified. If, however, demurrage shall be incurred at ports of loading and/or discharge by fire, explosion in or on board the plant of, or by breakdown of machinery of the Charterer, Shipper or Consignee of the cargo, the rate of demurrage so incurred shall be reduced to $ 12.50 per running hour and pro rata for part of a hour for demurrage so incurred.

11. Ports and other charges on the cargo shall be paid by the Charterer and dues and other charges on the Vessel shall be paid by the Owner. The Vessel, however, shall always be free of wharfage, dockage, and quay dues. Any taxes on freight at loading or discharging ports are to be borne by Charterer.

12. The last two successive cargoes carried, or to be carried, by the Vessel immediately preceding her entering upon this Charter consisted, or will consist, of

13. No product shall be shipped which fails to meet one or the other of the two following requirements:
(1) The vapor pressure at one hundred degrees Fahrenheit (100°F.) shall not exceed thirteen pounds (13 lbs.) as determined by the A. S. T. M. Method (Reid Method) identified as D-323 current at the time shipment is made.
(2) The distillation loss shall not exceed four per cent (4%) and the sum of the distillation loss and the distillate collected in the receiving graduate shall not exceed ten per cent (10%), when the thermometer reads one hundred twenty-two degrees Fahrenheit (122°F.) as determined by the A. S. T. M. Method identified as D-86 current at the time shipment is made. When products other than Naphtha or Gasoline are tested, the distillation test shall be made by A. S. T. M. Method identified as D-86 current at the time shipment is made. When products other than Naphtha or Gasoline are tested, the distillation loss may be determined by distilling not less than twenty-five per cent (25%) and deducting from one hundred per cent (100%), the sum of the volumes of the distillate and the residue in the flask brought to a temperature of sixty degrees Fahrenheit (60°F.). 12/20/38

14.—The Charterer shall have the option of shipping lawful merchandise in cases and/or cans and/or other packages in Vessel's forward, tween decks and/or other suitable space available subject, however, to Master's approval as to kind and character, amount and stowage. Charterer shall pay bulk oil rate of freight per ton of (2,240 pounds) weight or measurement, which option, plus all charges for additional handling, stowing and discharging. Any delay caused to the Vessel through loading or discharging of or other loss of time in connection with such cargo shall count as used lay time.

15. [illegible]

16. In case port of loading or discharge should be inaccessible owing to ice, the Vessel shall direct her course according to Master's judgment, notifying by telegraph or radio, if available, the Charterer, Shipper or Consignee, as to be bound to telegraph or radio orders for another port (at its option), which is free from ice and where there are facilities for the loading or reception of Petroleum in bulk. The whole of the time occupied from the time the Vessel is diverted by reason of the ice until her arrival at such free port shall be for the loading or discharge as the case may be shall be paid for by the Charterer at the rate of $ 25.00 per running hour.

17. If on Vessel's arrival off the port of loading or discharge there is danger of the Vessel being frozen in, the Master shall communicate by telegraph or radio, if available, with the Charterer, Shipper or Consignee of the cargo, who shall telegraph or radio him in reply giving orders to proceed to another port as per Clause 16, where there is no danger of ice and where there are the necessary facilities for the loading or discharging of Petroleum in bulk, or to remain at the original port at their risk, and in either case Charterer to pay for the time that the Vessel may be delayed at the rate of $ 25.00 per running hour.

18. Should the Charterer send the Vessel to any port or place where a quarantine exists and should the Vessel not be allowed to enter or be detained by reason of such quarantine not be declared until the Vessel is on passage to such port, the Charterer shall not be liable for any resulting delay.

19. If the Vessel, prior to or after entering upon this Charter has docked or docks at any wharf which is not rat-free or ostensible-free, she shall, before proceeding to a rat-free or ostensible-free wharf, be fumigated by the Owner at his expense except that if the Charterer ordered the Vessel to the infected wharf he shall bear the expenses of fumigation.

20. The Owner shall clean the tanks, pipes and pumps of the Vessel to the satisfaction of the Charterer's Inspector. The Vessel shall not be responsible for any admixture of more than one quality, if oil is shipped nor for leakage, contamination or deterioration in quality of the cargo unless the admixture, leakage, contamination or deterioration results from fail ure to exercise seaworthiness in existing at the time of loading or the exercise of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel her Master or servants of the Owner or the loading care or discharge of the cargo.

21. The Vessel her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage arising or resulting from any act neglect, default or incapacity of the Master pilots mariners or other servants of the Owner in the navigation or management of the Vessel, fire, unless caused by the personal design or neglect of the Owner collision stranding or peril danger or accident of the sea or other navigable waters, saving or attempting to save life or property, wastage in weight or bulk or any other loss or damage arising from inherent defect quality or vice of the cargo, any act or omission of the Charterer or Owner Shipper or Consignee of the cargo, their agents or representatives, insufficiency of packing, insufficiency or inadequacy of marks, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull equipment or machinery unseworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned equipped and supplied or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel her Master or Owner nor the Charterer shall unless otherwise in this Charter expressly provided be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from act of war act of war, act of public enemies, pirates or assailing thieves, arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo, strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general or riot or civil commotion.

22. In the event of accident, danger damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Shipowner is not responsible by statute or contract or otherwise, the Shippers, Consignees or Owners of the cargo shall contribute with the Shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. Salvage services rendered to the Vessel or cargo by another vessel owned by or in the service of the Owner of the Vessel shall be paid for as fully as if such Vessel were owned by or in the service of strangers.

23. This Charter shall so far as possible be governed by the laws of the flag of the Vessel, except in cases of general average, which shall be settled according to York/Antwerp Rules, 1924. 1 to 15 and 17 to 22 both inclusive and as to the matters not therein provided for according to the usages and customs of the port of New York. If a general average statement is required, it shall be prepared at New York by adjusters appointed by the Owner, subject to approval of Charterer, who shall attend to the settlement and adjustment of the general average subject to customary charges. Should the Vessel put into a port of distress or be under average, she is to be consigned to the Owner's agents, paying them the usual charges and commissions.

24. The Vessel shall have liberty to call at any ports in any order, to sail with or without pilots, to tow or to be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage. Any salvage shall be for the sole benefit of the Owner.

25. Bills of Lading in the form appearing on the reverse side hereof, for cargo shipped shall be signed by the Master as requested. Any Bill of Lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter.

26.—The Owner shall have the option, prior to the Vessel entering upon this Charter, of substituting another Vessel of equal class and of similar type, size and position, fulfillment of this Charter in all its terms and conditions.

27.—The Charterer shall have the option of subletting or assigning this Charter to any individual or company but the Charterer shall always remain responsible for the due

28. The Owner shall have an absolute lien on the cargo for all freight, dead freight, demurrage and costs, including attorney's fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any Bills of Lading covering the same, or of any storagemen.

29.—The Owner shall appoint Vessel's agents at all ports. Simpson, Spence & Young

30 Commission of 2½ per cent on the actual amount of freight is due to Owner and on freight is paid.

31.—Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of NEW YORK pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party within twenty days of the service of such first such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of a second arbitrator, notice, appoint its arbitrator to arbitrate the dispute of differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator had been named by the other party to the first moving party. Should either party fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this Clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

32.—Any provision of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from liability accorded to the Owner or Chartered Owner of vessels by any statute or rule of law for the time being in force.

33.—Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder.

IN WITNESS WHEREOF, THE PARTIES HAVE CAUSED THIS CHARTER TO BE EXECUTED IN DUPLICATE THE DAY AND YEAR HEREIN FIRST ABOVE WRITTEN.

COMPANIA NAVIERA LTDA. OF PANAMA

Witness the signature of P. St. Antippas

By [signature]

THE COASTWISE PETROLEUM COMPANY

Witness the signature of I. P. Schwartz

By [signature]

34. Any delay due to strikes at loading and discharging ports to be for charterer's account.

in U.S. dollars on telegraphic advice to owners agents of signing Bills of Lading, nonreturnable ship and/or cargo lost or not lost

(Testimony of Demetri Antippas.)

Q. Thereafter, was the vessel employed on the East Coast? A. That is correct.

Q. Handing you what has been marked Identification A-28, can you state what that is, please?

A. Yes. It is a charter party for a subsequent voyage of the Motor Tanker Urania between Sydney, Nova [1219] Scotia, and Philadelphia, Pennsylvania.

Q. What is the rate that was stated for the charter of the vessel?

A. $8 per ton, U. S. currency.

Q. Do you know of your own knowledge what the length of that voyage was, approximately?

A. Yes, I know. It was ten days.

Q. Can you state what the cargo was that was carried at that time? A. Yes. Benzoin.

Q. From what ports?

A. It was carried from Sydney, Nova Scotia, to Philadelphia, Pennsylvania.

Q. In what month?

A. I believe it was the month of December.

Q. Of what year? A. 1948.

Mr. Hokanson: I object to all this as not relevant to the issues in this case, what happened subsequent to November 11, or 17.

Mr. Howard: Again, Your Honor, this relates to our claim for loss of profits, and I submit this is the best evidence, which was as to what the vessel might have earned in a related period. This covered how the vessel was employed in Decembr

(Testimony of Demetri Antippas.)

of 1948, which is a period of [1220] only 30 or 60 days after this breakdown. I submit it is the best evidence possible as to the earning power of the vessel during that period upon which we claim our damages and loss of profits.

The Court: You will have to prove similarity of conditions in October and early November.

Q. Mr. Antippas, do you know what the conditions on the charter market were in October of 1948? A. Yes, I do.

Q. Do you know what the conditions in the charter market were in November or December of 1948? A. I do.

Q. Will you state what, if any, difference there would have been in the conditions of the charter market in those two periods?

A. The condition of the charter market in October, 1948, was higher than November or December.

Q. What accounts for that?

A. It is the period of the year. Usually during winter, especially up at that part, Sydney, Nova Scotia, when it starts freezing it is very questionable whether you can obtain a cargo or not, and it is at our own risk we are doing so.

Mr. White: May we object upon the ground, first, that there is no foundation laid that a boat could possibly have been chartered here which would support such testimony as this; and secondly, that this was a different time, under different conditions, with different parties, carrying a different product.

I submit to the Court that under those circum-

(Testimony of Demetri Antippas.)

stances this could have practically no weight as far as showing any loss of profits is concerned.

Mr. Howard: May it please the Court, this witness has testified that when the ship left Winslow, it was proceeding on owners' orders to the Panama Canal. I think the inference is plain that she was intended for operation on the East Coast. The fact that we are dealing in two different coasts has no relation to the claim on loss of profits, in my opinion.

The way I analyze this, as long as we show that the owner intended to take this vessel to the East Coast and he was delayed in getting it to the East Coast by reason of the breakdown of the vessel, which we claim to be due to some fault on the part of the cross respondent, it is entirely appropriate to offer this and to discuss this subsequent charter as showing what the vessel might have obtained if it had arrived on the East Coast at an earlier date.

The Court: It would seem to the Court that the detail is improper. It is enough to qualify the witness [1222] to state what the charter market was on each coast, or any coast that might be regarded as material. I do not think this exhibit would be admissible.

That does not keep you from inquiring of this witness as to his knowledge of the charter market at some time and place that is material, and if he shows that he is qualified to state what the charter market was, that is another matter upon which the Court is not at this moment called upon to rule.

(Testimony of Demetri Antippas.)

Q. In your position as an officer of the claimant and cross libelant corporation, do you have any occasion to deal with the fixing of the vessel for employment? A. I do.

Q. What, if any, responsibility do you have in connection with such detail?

A. Negotiating the whole charter when it is presented to me. They present us with certain possibilities and offers. I select the one which is most appropriate, according to my estimation, negotiating all the terms of the charter and approving it.

Q. During the months of September, October, November and December, 1948, were you familiar with the conditions of the charter market on the East Coast of the United States?

A. I was at all times.

Mr. White: I object to that, Your Honor, on the [1223] ground that what the charter market might have been on the East Coast in December would have no bearing upon the issues in this case, since if there is any loss of profits it is during the month of October, around there.

The Court: The objection is sustained.

Q. Eliminating the month of December, will you state now what knowledge you had of the charter market on the East Coast?

The Court: In October and November would be proper times, it would seem to me.

A. About the end of October, the charter market usually goes down. Usually the best months are

(Testimony of Demetri Antippas.)

prior to November. October would be a good month, and I know from definite offers that we have—that we had better chances of making a better charter than this one here, in the month of October, than we would have had in the month of November.

Q. Do you know what the profit was to your company on the charter that you have referred to before?

A. Approximately three thousand and some odd dollars for the period of ten days.

Mr. White: I object to that, your Honor, on the grounds as stated before; different conditions, different product, different time, different parties involved.

The Court: The objection is sustained as to this particular proposed charter. [1224]

Mr. Howard: I would like to make a very brief statement. This vessel broke down on the West Coast of the United States or Mexico. Obviously, it would not be possible to charter a vessel during the period it is broken down.

We submit that we should be entitled to prove by this witness what the vessel earned when it did get back to the East Coast after repairs had been made, because we obviously could not testify as to the earning power of the vessel during the period it was broken down.

The Court: You could prove by some witness who knows what the charter market was for a vessel of this type during the period of the breakdown.

(Testimony of Demetri Antippas.)

The objection is sustained and the Court will disregard the statement of the witness regarding the profits of this charter.

Mr. Howard: At this time, for the purpose of the record, I offer Identification A-28.

Mr. White: That is objected to on the grounds previously announced.

The Court: Sustained. Admission is denied.

Mr. Howard: You may cross-examine.

Cross-Examination

By Mr. Hokanson:

Q. Referring to Exhibit A-27, that was the replenishing of the bunkers after the trip commencing at Seattle. That was the first time the bunkers had to be replenished after the ship left Seattle on October 15, is it not?

A. That is correct.

Q. So far as you know, the vessel did not break down until October 26, 1948?

A. I know it broke down before once.

Q. Before October 26?

A. Yes, the steering gear as mentioned in the log.

Q. Apart from that item, the engine breakdown occurred on October 26?

A. That is correct.

Q. So that oil was consumed during the voyage from Seattle to Manzanillo, was it not?

A. Yes.

(Testimony of Demetri Antippas.)

Q. Do you know how much oil was consumed during that period?

A. Not offhand, no. I would have to refer to certain data.

Q. Do you know how many miles it is from Puget Sound to Manzanillo?

A. I think approximately 2,400 miles.

Q. On that basis, are you able to state how much oil was consumed? [1226]

A. I would venture a rough guess, which would be about 20 tons.

Mr. Howard: Twenty tons?

The Witness: Yes.

Q. On the basis of the cost of the oil replenished, as shown by Exhibit A-27, what would be the price of that much oil?

A. I will have to convert it; just a minute. Approximately $400, I should say. I would have to figure it out mathematically; this is just a rough estimate I am giving you.

Q. What is the unit cost shown on A-27?

A. $3.35 per barrel.

Q. In terms of barrels, how many barrels would the ship have consumed on a 2400 mile voyage?

A. Usually, 6.6 barrels per ton, so multiplying 20 by 6.6, we would get the approximate barrel quantity.

Q. You have referred to the engine log, Exhibit A-12. If my recollection is correct, you stated that the temperature of the lubricating oil cooler be-

(Testimony of Demetri Antippas.)

tween October 15 and October 26 is shown by daily entries in the log, is that correct? A. Yes.

Q. What is the entry for October 16?

A. Which entry are you referring to? [1227]

Q. The lubricating oil temperature into the cooler.

A. It is 125 out—125° Fahrenheit at the output, coming out.

Q. What does it show what the temperature was going into the cooler? A. 100.

Q. That is wrong, isn't it?

A. It should be the other way around.

Q. In other words, the temperature is lower coming out than going in?

A. That is correct. I mean, it has been written down wrong here, but that is the main idea.

Q. Do you find any entries thereafter covering the temperature of the lubricating oil cooler prior to October 26? A. No, I don't.

Q. Then your testimony was wrong when you stated that the entries were regularly made during that period, is that correct? A. Partly.

Q. That is a record that should be made in the log, isn't it?

A. Not necessarily; it depends on the chief engineer and what you require from him.

Q. If you are going to keep track of the cooler, you [1228] have got to know what the temperatures are, don't you? A. Yes.

Q. Consequently, you should make entries in

(Testimony of Demetri Antippas.)

your log as a basis for determining what the performance record is?

A. No. You can read that from your thermometer and from your pressures.

Q. But there is a place for the entry in your logbook, isn't there? A. Yes, there is.

Q. It was only made on October 16th, the only time that entry was made?

A. That is correct.

Q. You don't know of your own knowledge whether that auxiliary pump was used or not, do you? A. I do.

Q. Didn't you state in your testimony earlier that the last time you were in Seattle prior to the departure of that vessel was about September 4, 1948? A. That is correct.

Q. You didn't see the vessel again, did you, until about November 11, 1948?

A. That is correct.

Q. And the ship had been on a long voyage down to Manzanillo and back to Los Angeles during that period, isn't that correct? [1229]

A. That is true.

Q. Not being aboard the vessel, you don't know what was done with respect to the use of the pump, do you?

A. I do know from reports of the chief engineer.

Q. You are basing it on what the chief engineer told you?

(Testimony of Demetri Antippas.)

A. From daily reports from the chief engineer which I required from him.

Q. Do you know whether he used that pump commencing November 4, 1948?

A. Yes, he did.

Q. He did use it on that date?

A. I believe he did.

Q. But not prior there to?

A. Not prior thereto.

Q. Would it be proper to make an entry in the log showing the use of the pump on that date?

A. No, not necessarily.

Q. It is an abnormal procedure, isn't it?

A. It was an abnormal voyage; the vessel had broken down.

Q. As a matter of fact, there is no record in the log showing that the pump was used, is there?

A. There is no record whatsoever.

Q. When did you translate the manual that was put [1230] aboard the vessel by The Union Diesel Engine Company?

A. I had a manual in New York which I translated and sent copies of the translation to the chief engineer. That was not at his request. I did that long since the day he went on board the vessel.

Q. All of the entries in that manual were translated?

A. Well, the most important ones. He could read most of it, anyway.

Q. When did you send it to him?

(Testimony of Demetri Antippas.)

A. At various intervals. I would translate a part, and I would let him have it just the same way as I translated it, all the nomenclature of the various valves and switches on the boat.

Q. You never notified Mr. Black or Mr. Featherstone concerning that breakdown at any time, did you, Mr. Antippas?

A. Are you referring to the main engine breakdown?

Q. That is right. A. No, I did not.

Q. You received a telegram from the master of the vessel stating quite fully the character of the breakdown, didn't you?

A. It was the opinion, I should say, of what they thought at the time was the breakdown of the vessel.

Q. When did you receive that letter?

A. I believe after the service man went on board. I [1231] don't recall the exact date. It was after the Union Diesel service man went on board.

Q. You were in communication with the master by telephone during this period?

A. Constantly.

Q. You notified him as soon as you had information of the breakdown to return to Los Angeles where repairs were effected, didn't you?

A. That is correct.

Q. You were acquainted with the fact that the matter had stated in a telegram to your company that the appearance of work on the exterior of the

(Testimony of Demetri Antippas.)

engine was such as to require the return to port for a full inspection of bearings, pistons, liners, etc., isn't that true?

A. That is not a report made by the captain. The captain did not send me any telegram of that kind.

Q. Handing you Exhibits A-9 and A-10, you will find some telegrams or copies thereof among those exhibits. Will you read one dated November 1, addressed to Antippas, Forest Hills, Long Island, New York, signed by Beis?

A. Yes. It says, "Union Diesel service man advises"—it is a report of the Union Diesel service man, transmitted to me by the captain.

Q. Read the telegram.

A. "Union Diesel service man advises that vessel [1232] Urania proceed to port on West Coast USA and that the service of additional service man of Union Diesel be made available upon arrival. All gears are now installed but from appearance of some of the careless work on the exterior of the engine believes bearings, pistons and liners be closely examined. All of the air, water and lube oil tubing were badly kinked when installed in Seattle and from the appearance of workmanship done there service man unable to safely pass inspection of engine. Facilities in Manzanillo not adequate for even an inspection. Will try to contact Demetri at his house by ship's telephone tonight." New York time 11 o'clock, and so on, signed "Beis."

(Testimony of Demetri Antippas.)

Q. If you knew the character of this breakdown at that time and had until November 11 in which to make arrangements for inspection of the vessel upon her arrival in Los Angeles, why then did you not notify Commercial Ship Repair if you felt that they were in any way responsible for these repairs?

Mr. Howard: Objected to as being not within the proper scope of the direct examination.

The Court: Is there any response?

Mr. Hokanson: He has gone into this breakdown at some length. I think it is very important here.

The Court: By this witness, do you seek information tending to establish or disestablish what issue? [1233]

Mr. Hokanson: Tending to establish that we were never notified of this situation, never given the opportunity to make an inspection on the spot and to determine with our own experts what caused this breakdown.

The Court: The objection is overruled.

A. Would you read the question?

(Last question read by reporter.)

A. I did not know what caused the breakdown, and therefore I could not say that Commercial Ship Repair was responsible for it.

Q. Isn't it true that these lubricating oil coolers were taken off the vessel on or about November 12?

A. I know they were taken out; I don't recall

(Testimony of Demetri Antippas.)

the exact date. It may have been the 12th or 13th, I don't know.

Q. You got a report on them immediately, didn't you?

A. Not immediately. It was the next day, I believe.

Q. You had the opportunity then, if you felt Commercial Ship Repair was responsible, to notify them of the situation, did you not?

A. I had not—I suppose I could, yes.

Q. But you didn't give them the chance?

Mr. Howard: That is objected to. I think he should ask him what he did without——

The Court: The objection is overruled. [1234]

A. It all depends on how you put it, not giving them a chance. Would you please let me know in a little more detail what you mean?

Q. I think the question is clear. If you can't answer it, I won't pursue it further.

What happened to the gears that were taken off this vessel?

A. I believe they were left on the vessel.

Q. Did you make any effort to produce them here for the trial? A. Yes, I did.

Q. This trial has been pending since about November of 1948, has it not?

A. I believe so, yes.

Q. And during that time the Urania has been in and out of the States several times, has she not?

A. Twice, I think.

(Testimony of Demetri Antippas.)

The Court: What state do you refer to in that question?

Mr. Hokanson: The United States, Your Honor.

Q. You have seen the vessel since, have you not? A. I have seen her once.

Q. Do you know where the gears are now?

A. I don't know. I thought they were on board, but apparently they are not. [1235]

Q. What happened to the oil sample that was taken on November 4, if you know, Mr. Antippas?

A. Only from what was reported to me I can tell you.

Q. It was not preserved, was it?

A. It was preserved by the chief engineer, and apparently the steward found it and not knowing what it was he just threw it overboard. It was in a glass.

Q. Did you have anything to do with the testing of these heat exchangers?

Mr. Howard: Where and when, counsel?

Mr. Hokanson: We are talking about the situation now in Los Angeles or Long Beach.

A. Well, to the extent that I knew that finally we arrived at that conclusion that that must be the reason, when we found the salt water; and to the extent I knew they were taken out to the shop; and to the extent that I received the reports, but not by actual seeing.

Q. At whose direction were they removed from the vessel?

(Testimony of Demetri Antippas.)

A. They were removed from the vessel at the direction of Mr. Newell, who suggested that they were the cause of this breakdown.

Q. Did he tell you that at the time?

A. Yes, he told me that at the time, I believe.

Q. Why then didn't you direct that they be tested before they were cleaned, and determine whether leaks then [1236] existed in the coolers?

A. First, it isn't up to me to say how this test is going to be carried out. There are accepted practices by the people who do such work.

Q. So far as you know, no effort was made to test them before they were cleaned, is that right?

A. I know that you cannot determine leaks unless you clean them. That is from my own personal knowledge, of course.

Q. You mean to say if there are leaks in a cooler they won't show up unless the cooler is cleaned?

A. They will show, but you won't be able to see the exact source of it unless you clean it. As you heard the testimony before, there is such a minute opening you can't trace it even when it is cleaned.

Q. You heard Mr. Lund testify the other day that he had paid at your authorization for the services of Commercial Ship Repair machinists and electrician at Port Angeles, Washington, in connection with repairs to the telemotor, do you remember that testimony? A. Yes, I do.

Q. You authorized payment of that bill, did you not?

(Testimony of Demetri Antippas.)

A. I authorized it by telephone before I received the bill.

Q. If you felt that that was the responsibility of [1237] Commercial Ship Repair, why did you pay the bill?

A. I did not know that Commercial Ship Repair men were employed in this repair. I was aware that Mr. Clarke had left from here with two workmen, I didn't know where they came from. As a matter of fact, I insisted on the payment then to clarify the situation.

Q. Did Mr. Lund tell you who made those repairs?

A. No. I just found out about it when I got the report.

Mr. Hokanson: I have no further questions.

Redirect Examination

By Mr. Howard:

Q. Do you know why the standby fire pump was used in November, 1948? A. Yes, I do.

Q. Why?

A. The engine was overheating.

Q. What would be the purpose of using the standby fire pump?

A. When the engine overheats, it is apparent you have to cool the engine in some way, and the only way is to increase the cleansing agent through the water cooler.

Q. Through the water cooler?

A. That is right, through the water cooler.

(Testimony of Demetri Antippas.)

Q. Would that increase the pressure of salt water through the lubricating oil cooler?

A. Possibly.

Q. What effort did you make to locate these gears that were replaced on the Tanker Urania?

A. I sent a man down to the Gulf port where she was located, with the express task to try to find those gears. As a matter of fact, I tried to find both sets of gears, if possible.

Q. Did he locate them?

A. No. His answer was that he could not locate them on board.

Q. Do you know what happened to the gears?

A. I can only venture a guess.

Q. Do you know what happened?

A. I don't know, no.

Mr. Howard: I have no further questions.

The Court: The point that I wish to inquire about is: did you or anyone else for you determine the amount of actual fuel oil consumption on the Urania from the time of this breakdown on October 26, I believe, until the vessel proceeded from Long Beach on the remainder of the voyage after making the repairs in the Craig Yard at Long Beach, or wherever the repairs were made in a Southern California port? Did anyone on your [1239] behalf determine the actual amount of fuel oil consumption during that lay-up period?

The Witness: I did, Your Honor, myself.

The Court: How much was it?

(Testimony of Demetri Antippas.)

The Witness: I will have to refer to notes which I haven't got here, Your Honor.

Mr. Howard: Do you have them in the courtroom?

The Witness: No.

Mr. Howard: Are they with you in Seattle?

The Witness: Yes, they are.

The Court: I wish the Court to have that information.

Mr. Howard: We will undertake to provide it right after the noon recess.

The Court: The amount and value is what the Court would be interested in in that detail.

Mr. Hokanson: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Howard: Your Honor, that completes the cross-libelant's case in chief, with the exception that we would like to undertake to provide this information by this witness as to the fuel consumed from the notes he has available right after lunch.

The Court: Court is recessed until 1:30. [1240]

(At 11:57 o'clock a.m., Thursday, April 14, 1949, proceedings recessed until 1:30 o'clock p.m., Thursday, April 14, 1949.)

Seattle, Washington

(Testimony of Demetri Antippas.)

April 14, 1949, 1:30 o'Clock P.M.

Mr. Howard: I would like to recall Mr. Antippas.

DEMETRI ANTIPPAS

was recalled as a witness by and on behalf of respondent, and having been previously duly sworn, was examined and testified as follows:

Redirect Examination

By Mr. Howard:

Q. Do you have with you now a computation of the amount of Diesel oil which you claim to have been consumed by reason of the breakdown and return of the vessel to Los Angeles for repairs?

A. I do.

The Court: Can you give the dates as to when it was consumed?

Q. Will you indicate the dates that this covers?

A. Yes. One day, from the breakdown, which was late in the evening, late in the night of October 26, to the arrival of the vessel at Manzanillo, one day's consumption, which is rated at 16 barrels per day, so 16 barrels for that day. Six days in Manzanillo while the vessel was under repair and for the trial run, 35 barrels.

Q. Figured at how many barrels consumption per day?

A. Five barrels for all the auxiliaries.

The Court: Six days while the vessel was laid up at Manzanillo?

(Testimony of Demetri Antippas.)

The Witness: That is correct, Your Honor. That would include the trial run, the 35 barrels.

The Court: That was 35 barrels consumed during those six days?

The Witness: That is correct. From Manzanillo on the way to Los Angeles up to the time of the breakdown, 36 hours run at full speed, would give us 24 barrels consumption.

The Court: By "Los Angeles," you mean Long Beach?

The Witness: Yes, that is what I mean, Your Honor.

Q. That is up to the period of the breakdown?

A. That is correct.

Q. And your next item?

A. Would be from the time of the breakdown, while the vessel went on tow, up to the time she arrived in Los Angeles, six days, part of which were the engine being under operation, would give us 30 barrels.

Q. At what rate of consumption per day?

A. Approximately five barrels per day.

The Court: I do not know that I understand what was said about subsequent to the breakdown.

The Witness: Subsequent to the breakdown, Your Honor, the engine was operated for an hour at a time, and, of course, also for the operation of auxiliaries. It was six days for the elapsed time, and about 30 barrels were expended.

(Testimony of Demetri Antippas.)

Q. Your next item?

The Court: Have you a computation there from the time of the breakdown off Long Beach until the arrival at Long Beach, of the number of barrels?

The Witness: You mean from off Manzanillo?

The Court: Wherever it was 36 hours after you left Manzanillo; there was a breakdown and during that 36 hours there were 24 barrels consumed?

The Witness: That is correct.

The Court: After that time until the arrival, have you a computation?

The Witness: Yes; thirty barrels.

The Court: After that?

The Witness: Los Angeles, six days while under repairs, twelve barrels.

The Court: Does that mean Long Beach?

Mr. Howard: Yes, Your Honor, Los Angeles harbor includes Long Beach.

The Court: After the arrival at Long Beach, I ask again how many barrels did you use during the breakdown?

The Witness: We used twelve barrels while alongside the pier, dock trials and everything. For the trial trip, we used eight barrels; and then five and one-half days sailing for the vessel to return to Manzanillo, 88 barrels.

The Court: What does that make the total?

The Witness: 213 barrels at $3.35 per barrel.

(Testimony of Demetri Antippas.)

Q. Do you have a figure on that?

A. Yes. $692.25.

Q. Was some oil furnished to the salvage tug that towed the vessel in?

A. Yes. I believe we furnished—I don't remember the number of gallons. I remember the amount we were credited with, $168.00 for that fuel, which was taken off the bill, of course. [1244]

Q. So that that Diesel fuel that you furnished the tug really made up a partial payment on your towing charge? A. That is correct.

Q. Is that shown on the Pacific Towboat & Salvage Company invoice now admitted in the record as Exhibit A-25? A. That is correct.

Q. Going back to this period in Los Angeles harbor for repairs, six days, you say you used 12 barrels? Why do you compute that at a lower rate?

A. We used shore current and we only used our auxiliaries for certain other purposes; pumping, cleaning the tanks and things like that, the usual operation of the boat.

Q. State if you know whether the price of $3.35 per barrel was the going market rate for this grade of bunker Diesel fuel oil at San Pedro in November 24, 1948?

A. That is according to our contract, in which we have a scale.

Mr. Howard: I have no further questions.

(Testimony of Demetri Antippas.)

Recross Examination

By Mr. Hokanson:

Q. Did I understand you to say that your rate of consumption per day of fuel oil was 16 barrels?

A. That is correct. [1245]

Q. That is at what speed?

A. That is at, I believe, 280 revolutions.

Q. I understand you to say you estimated a consumption of 30 barrels of oil between the date of the second breakdown, which my record shows was on November 5, until the vessel arrived at Los Angeles? A. That is correct.

Q. Would your estimate be the same if the log disclosed that during that period the engine was run for a total of only 8 hours at a speed of 140 revolutions?

A. Yes, because we also ran our auxiliaries, and the figure given there is not mostly based on hours of running of the engine; it is based on hours of running the auxiliaries, five barrels a day.

Q. No further questions on that line, but before you step down, Mr. Antippas, would you do me the favor of translating the log entry in the engine log for September 4, 1948? Would you look at that entry? A. Yes.

Q. Does it not state, "Cleaning and testing by hydraulic pressure of the oil and water cooling radiator of main engine"?

A. That is correct.

Q. Would you turn now to the deck log?

(Testimony of Demetri Antippas.)

A. Which day do you want me to turn it to?

Q. For October 29, and tell me whether the entries for that date are in English or in Greek?

A. In the deck log?

Q. October 29, in the deck log.

A. It is in English.

Mr. Hokanson: That is all.

Mr. Howard: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Howard: That concludes cross-libelant's case in chief, if the Court please.

The Court: As I understand it, cross libelant rests?

Mr. Howard: That is correct, Your Honor.

The Court: How many parties for cross-libelant are there? Only the Compania Naviera Limitada?

Mr. Howard: Just the corporation, the one company, Your Honor.

The Court: Cross respondents and libelants may now proceed.

Mr. Hokanson: May it please the Court, will the Court allow counsel for cross-respondents ten minutes to make a motion? [1247]

The Court: I will allow you to make the motion. You may proceed.

Mr. Hokanson: Come now the cross respondents and move for the entry of an order dismissing the cross libel of the cross-libelant in this action

on the ground and for the reason that no evidence has been introduced in this cause sufficient to establish a prima facie case which would develop a proximate relationship between the damages here testified to and the work performed by Commercial Ship Repair, the cross-respondent.

With the Court's permission and in the interests of saving some time with respect to testimony by way of defense, Mr. White would like to address the Court on two items of the cross-libel.

Mr. White: Your Honor, the items on which I wish to address the Court are the delay charges at Winslow, Washington, and the loss of profits item. In the first place, on the delay, testimony in the record is that there was no delay at Winslow, Washington. I am quoting directly from a transcript of Mr. Williams' testimony, who was the agent of the cross-libelant:

"Q. If you know, was there any urgency about the completion of this job?

A. Not that I know of.

Q. Did Mr. Antippas ever request that the job be [1248] hurried along?

A. The last week or so, he was uneasy. He wanted to know when it would get out.

Q. By the last week, you have reference to the last week you were in Winslow?

A. That is right."

Your Honor, there is no definite—that may be a conversation advisory to when the ship may be ready, but there is no evidence either from the lips

of Mr. Antippas or from the lips of his man Mr. Williams as to any delay.

The Court's attention is called to the case decided by Judge Neterer, which is cited in cross-respondents' brief, page 6. It is a lengthy citation which I will just read a small portion of. The identical problem was at issue there.

"There must be a mutual promise and a agreement, and there is none such in the record. The mere conversation advisory with relation to time, etc., is not sufficient, but the understanding must be definite and positive."

Then further on he states:

"It is not reasonable to presume that the claimants would have silently stood by in the daily performance of the work by the libelant if the understanding had been as contended for by the claimants. Human nature and self-interest do not operate in that way." [1249]

It is submitted, Your Honor, that had there been any agreement as to the specific date, certainly Mr. Antippas or his representative would have complained to Commercial Ship Repair. There is not even a scintilla of evidence in the record that any such was ever done.

Moreover, as far as the original contract is concerned, by Mr. Antippas' own testimony he has waived the strict compliance with the provisions of the original contract. He has testified twice that he was not in any hurry about it, and so advised Commercial Ship Repair that he would not hold them to the eighteen days' provision.

Furthermore, Your Honor, wherever there is extra work ordered, that would extend the contract in any event, so it is our contention that on that particular point Judge Neterer's decision is controlling; that here in the absence of any positive and definite agreement as to a specific date on which the ship would be ready that there is no issue of fact raised.

With respect to the loss of profits, briefly, Mr. Wallace testified this morning, he again being the agent of the cross-libelant, that at the time this ship was in Winslow during the time of the breakdown, it was impossible to get a charter of the ship, and that they did attempt to, and that the only attempt which even [1250] proceeded to any degree fell through. He said—I am not quoting him verbatim, but as I recall he said something like this, that it was very difficult at that time to obtain a charter for the ship, and that efforts were made. Certainly the inference would be that if efforts were made, there would be some more substantial testimony than there has been as to any possibility of charter.

The Court's attention is called in this connection to Todd Erie Basin Dry Docks vs. The Penelopi, which is cited, I might add, in cross libelant's brief. They have the American Maritime citation. The Federal Reporter citation is 148 F. (2nd) 884. I think it will be conceded by both parties that this case is probably the latest. It is a Second Circuit

case, probably the latest declaration of competent authority on this particular subject.

This was a reversal of the District Court on the ground that the District Court had imposed too heavy a burden upon the owners to show their loss of profits. However, even in reversing the determination of the District Court of Appeals, the Circuit Court said:

"(2) In so far as the court's decision rests on the statement in the opinion that it was incumbent on Polar to prove "that it was willing to charter the vessel to some known agent for a specified voyage at an agreed rate,' [125] we think it imposes a rule of proof more exacting than the controlling authorities require . . . Mr. Justice Brown stated that demurrage 'will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certaintly'."

Now, in this case we have no competent testimony as to profits that might have been made. In fact, the evidence by their own agent is to the contrary, and we submit on those two items that there isn't a scintilla of evidence in the record which will support a judgment. On the other items, we feel the same way; however, we have many witnesses here this afternoon and we feel it would not be proper to argue the rest of the items at length at this time.

The Court: I will be glad to hear from cross libelant on these two items.

Mr. Howard: Very briefly, Your Honor, as far

as the extras at Winslow are concerned, and the delay in completing the repairs, I call Your Honor's attention to Respondent's Exhibit A-1, being a letter signed by Mr. Black on behalf of cross respondent, in which he proposed to do this work in 18 working days.

I call Your Honor's attention also to the computation of time which is contained in the trial brief that has been filed, from which it will be apparent that the [1252] cross libelant is not seeking a recovery for all of the time beyond the 18 working days until the repairs on the vessel were completed. The time has been allocated on the basis of what we think would be the most logical breakdown between the time required to perform the extra work and the delay in completing the contract work.

As far as loss of profits is concerned, we submit that the proof on that is still a matter to be decided by the Court. As to the other periods of time involved in the claim in the cross libel, such as loss of profits during delay at Manzanillo and at Long Beach, we submit there has been ample evidence offered in this case to substantiate a claim for loss of profits.

I recognize the authority which counsel has cited, and I have called it to the Court's attention in my memorandum of authorities on this particular point; and as to that item we strongly maintain that we have made an offer of proof sufficient to establish our loss of profits during the periods covered. I understand counsel's motion to go, however, only

to the two items, being items 3 and 4 of the cross libel relating to the expense incurred during delay at Winslow, Washington, and the loss of profits during that period, and that their motion does not go to the items in the cross libel relating to loss of profits and expenses in Mexican and [1253] California waters. If I am mistaken in that, I would like to be corrected.

Mr. White: It goes to both, counsel.

Mr. Howard: And you argued it from the standpoint of the items at Winslow.

The Court: The Court is ready to rule. The Court denies the motion to dismiss the cross libel, but advises counsel on both sides that the Court does not intend to allow any recovery on the cross libel respecting the first two items mentioned; one, respecting delay in doing of the repair job while the vessel was at Winslow, and two, respecting loss of profits during such alleged delay.

The Court is of the opinion that any original understanding which may have been had was modified and waived by the subsequent conduct of the cross libelant, and that no certainty as to loss of profits during the delay in the making of the repairs while the vessel was at Winslow; clearly not within such degree of certainty as would authorize the Court to allow a recovery on account of such loss of profits.

The Court will hear any further testimony that may be offered respecting the item which the Court now denominates as the third item; namely, the

expenses and repairs and damages for delay while the vessel was in [1254] Mexican and California waters and ports. The Court will consider that further upon the close of all the evidence in the case.

The cross respondents and libelants may now proceed in respect to their answer to the other items of the cross libel not disposed of by the Court's announcement of intention.

(Opening statement made by counsel for libelants and cross respondents.)

The Court: Call the cross respondents' first witness.

Mr. Hokanson: Mr. Oakland.

WALTER W. OAKLAND

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please.

A. Walter W. Oakland.

Q. Where do you reside?

A. Winslow, Washington. [1255]

Q. What is your occupation?

A. Foreman of the pipe shop at Commercial Ship Repair.

Q. How long have you held that position?

A. I have been with the Commercial Ship Repair ever since they bought the yard, and I was over at this yard for about 30 years last October.

(Testimony of Walter W. Oakland.)

Q. At the Winslow yard? A. Yes, sir.

Q. During that 30 years, what has your experience been? A. Beg pardon?

Q. What have you done as an employee of the yard during those 30 years?

A. I have been foreman of the pipe shop all the time.

Q. Do your duties as foreman of the pipe shop include the cleaning and testing of heat exchangers?

A. Yes.

Mr. Howard: I object to that as leading.

The Court: Sustained. Ask him what his duties include.

Q. What do your duties include as pipe shop foreman with respect to items of repair and inspection of vessels?

A. Well, anything in relation to pipe work, and any repairs, and new installations or repairs or testing equipment.

Q. What kind of equpiment? [1256]

A. Coolers and heat exchangers, piping, by air bottles, tanks, and so on like that.

Q. During your 30 years of experience, Mr. Oakland, do you have any estimate of how many coolers you have cleaned and tested during that period?

A. I wouldn't have an accurate estimate, but I would say around hundreds or more, different types.

Q. Were you working in the yard, the Winslow yard, during the months of August, September and October of 1948? A. Yes, sir.

(Testimony of Walter W. Oakland.)

Q. Do you remember the Motor Tanker Urania?

A. Yes, sir.

Q. Do you remember whether the heat exchangers from the Urania were ever in your pipe shop?

A. Yes, sir.

Q. Which ones, if you know?

A. All of them; for the auxiliary engines and the main engine.

Q. How many heat exchangers were there for the main engine of the Urania, if you remember?

A. Two heat exchangers, and one lube oil cooler.

The Court: What kind of a cooler?

The Witness: Lube oil cooler, sir.

Q. When you speak of a heat exchanger as contrasted with a lube oil cooler, what do you mean?

A. The heat exchanger is changing the heat temperatures from fresh water by cooling it with salt water. A lube oil cooler, you change the temperature of the lube oil by the salt water passing through the cooler.

Q. Were these heat exchangers of the same type on the Urania? A. Yes, sir.

Q. What kind of heat exchangers were they, if you remember?

A. I believe they were the Harrison type.

Q. You have reference now to all three, the heat exchangers and the lube oil cooler?

A. Yes, sir.

Q. Do you remember when these heat exchangers and cooler were in your shop?

(Testimony of Walter W. Oakland.)

A. I don't have a recollection of the exact date, but it was the fore part of September, I think.

Q. Could you state the circumstance with respect to how these exchangers and the cooler got there?

A. The chief engineer stopped me on the boat, and he didn't talk very good English. He pointed out these heat exchangers and lube oil coolers laying on the deck, and he told me he was going to have them—wanted me to clean and test them. He used the name "press" for test.

Mr. Howard: Used the name what? [1258]

The Witness: Press. He meant pressure; he says press.

Q. Was there any further discussion concerning the items at that time?

A. The only thing that I told him, he would have to send them to the shop and I would take care of it. I asked him how much pressure he wanted put on, and he said 50 pounds, and I asked him "50 pounds, okay?" and he says, "okay" and done like that (indicating).

Q. What happened thereafter, if you remember, concerning these heat exchangers? Were they sent to the shop?

A. The cleaning crew from the yard brought the heat exchangers and lube oil cooler up to the pipe shop and set them in the shop, and I started in getting prepared to clean them with a chemical cleaning——

Q. When was that?

(Testimony of Walter W. Oakland.)

A. That was the next day, I think the same day that they sent them up.

Q. Could you describe what you did to the heat exchangers and the cooler?

A. I used a sump pump, which is a centrifuge pump, set that in a five-gallon bucket; then put my chemical in there, the acid in there for cleaning the salt water side first. Then I connected the pump under one side of the cooler and a piece of hose to the other side back into the [1259] bucket. We started the pump and that circulated acid through the cooler. I circulated four hours that way and then reversed the direction of flow so it went through the cooler the opposite direction, so in case there was any particles lodged in it it would take them out, and I circulated it four hours that way.

Then I washed them out with fresh water, putting a little baking soda in to neutralize the acid, and then took the air hose with a small chain on it and blew the cooler out.

Then I done the same procedure with the oil side of the cooler, only I used a different chemical. It was an oil-cleaning chemical that was circulated through the oil side of the cooler, and reversed the direction of flow on that the same way, and then I took an air hose and blew that out, and took the heads off from each end of the cooler and put 50 pounds pressure test on with the water hose and looked it over to see if there was any leaks. I didn't see any leaks, so I went down to the ship

(Testimony of Walter W. Oakland.)

to tell the chief engineer to come down and look at it, and he sent the second.

Q. What do you mean by "the second"?

A. The second assistant engineer, I should say, and he came up and looked it over, both ends of it, and he says "okay" and walked off.

Q. Was there anyone else present during the test, if [1260] you remember?

A. Frank Gallagher, the American Bureau inspector, was looking at it.

Q. How long did you run this test?

A. I run the test, I would say, around 20 minutes or maybe a little longer. I left the test on long enough for me to go down to the ship, get the engineer and come up and have him look it over, besides the time it took me to look it over. I would say 20 minutes or a little more.

Q. How did you regulate the pressure?

A. I had a pressure gauge connected on to the hose line going to the cooler with a valve on the gauge. When I got 50 pounds on it, I shut the valve tight, disconnected the hose feeding it, and let the pressure stand on the cooler.

Q. What kind of chemical did you use to circulate through the salt water side, if you remember?

A. It was called Jamlen's salt water cleaning compound.

Mr. Howard: Gamlen's, did you say?

The Witness: No, J-a-m-l-e-n's.

Q. Do you know what type of chemical that is?

(Testimony of Walter W. Oakland.)

A. No, I don't. It is their own secret.

Q. Does it have acid qualities?

A. It has acids, I don't know just what they are, and then you are to mix that with water, dilute it with water. [1261]

Q. In what proportion?

A. It all depends on the dirt and accumulation you have to move. It runs from 6-1, 6 of water to 1 of chemical, up to 8 to 1, 10 to 1.

Q. Do you remember what it was in this case?

A. I think, if I remember right, it was 8 water to 1 acid.

Q. What is the temperature of the cleaning fluid?

A. I kept the cleaning fluid, the acid, for the salt water side around 80°. They recommend keeping it warm. It will clean faster and better by keeping it warm while it circulates.

Q. What kind of solution did you use on the lubricating oil side of the cooler?

A. That is a Jamlen's compound too, and that is used straight.

Mr. Howard: Used straight?

The Witness: Yes, you don't dilute that.

Q. After you had run this hydrostatic test, were any leaks discovered in these exchangers?

A. We didn't find any leaks.

Q. In the cooler? A. In the cooler, either.

Q. Was there anything else done to the cooler or the heat exchangers? [1262]

(Testimony of Walter W. Oakland.)

A. After the test, we were through. I drained it all out and I put the two heads back on, made new gaskets, put the two heads back on, bolted them up and had the machine shop make up zinc pencils to go in. There is two zincs go in each one.

Q. What are they?

A. They are screwed in from the side right through the line of flow of salt water.

Q. What is the purpose of that?

A. That is to counteract the galvanic action.

Q. At what point are they inserted? Are they inserted in the cooler itself or in the pipe that leads into it? A. Beg pardon?

Q. Where are they inserted on the cooler?

A. Through a hole that is tapped in the side of the cooler, in the neck of the flanged part that goes into the cooler, so your zinc pencil is directly in the flow of salt water before it comes to the core.

Q. Do you knw what happened to the coolers after they left your shop?

A. I don't know. I just done all this under the direction of the chief engineer.

Q. You described the method you used on those heat exchangers. What is the usual practice in cleaning heat [1263] exchangers?

A. I would say that that is the usual practice, a common practice in shipyards. In regard to the test pressure, that would depend on your inspector or your chief engineer or the amount of working pressure that is required on a ship; and the Ameri-

(Testimony of Walter W. Oakland.)

can Bureau rules on that I think calls for twice the working pressure, twice the operating pressure, but not less than 15 pounds.

Mr. Hokanson: May it please the Court, I recognize that much of the testimony concerning this case in technical in character, and for the purpose of illustration and with the hope of assisting the Court in understanding more fully the matter that we are discussing, I have here for identification a heat exchanger and will ask that it be marked at this time.

(Heat exchanger marked Libelants' Exhibit 16 for Identification.)

Q. Could you step down a moment and examine this exhibit?

The Court: Ask him what he calls that exhibit.

Q. Showing you what has been marked for identification as Libelants' Exhibit 16, I will ask you to state what that is, if you know. Do you know what this is? A. Yes, sir.

Q. What is it? [1264]

A. That is a lube oil cooler.

Q. Do you know what type it is?

A. It is a Harrison type cooler.

Q. If you remember, is that the same type cooler as to construction that came off the Motor Tanker Urania?

A. It is exactly the same cooler, with the exception that the cooler on the Urania was larger. It was what they call a 3 inch cooler, which would

(Testimony of Walter W. Oakland.)

be an inch and a half wider, probably 2 inches wider and 3 or 4 inches longer.

The Court: I personally do not see any use of cluttering up the record with an exhibit that is not the thing that was worked upon in this case, but you may proceed.

Mr. Howard: If the Court please, as Mr. Antippas testified in our case this morning, we have had the cooler brought out here that was on the Urania and we have it right here in Seattle. I seriously considered bringing it in and offering it as an exhibit, but because of the size of it I did not do so, but I am willing to bring it in in rebuttal.

I make that statement now because if the Court is going to consider a heat exchanger, I propose to bring in the actual heat exchanger that was on the vessel.

The Court: Counsel on both sides in that connection should consider, if an appeal is taken from this Court's [1265] decision, what you would want to do with that kind of exhibit in presenting the appeal to the Apellate Court. You should not have anything before this Court that you do not think is practical to carry before the Apellate Court in case there is any review.

Mr. Hokanson: Very well, Your Honor. I will withdraw the proposed exhibit. I had in mind that that would be helpful to the Court in a full understanding of what is being testified to here.

The Court: The best way to help this particular

(Testimony of Walter W. Oakland.)

trier of the fact is to get the information in words.

Mr. Hokanson: Very well, Your Honor. I will withdraw the identification.

The Court: If you get all of the information submitted to the trial court in words, then you can get the same information exactly before any apellate court. This exhibit is withdrawn and returned to counsel who produced it.

Q. Calling your attention to Libelants' Exhibit 4, would you read the last sentence on the first page thereof, and tell me, if you know, what that particular item covered in connection with the Urania?

Mr. Howard: If you know.

A. "Furnish labor and material to repair circulating system of main engine as necessary." Well, that was a little [1266] indefinite in the writing up of this work order. It was at the time they had turned the water onto the main engine to start the circulating going, and they found two pieces of 3 inch pipe that was leaking, and so the chief brought them up to me, asked me if I would renew them. I should say he sent them up to me by the second engineer.

Then there was two fittings on the after end of the engine that was cracked and I renewed those, and there was a short piece of three-quarter pipe in the forward end of the engine that he wanted renewed, too, and that was what this particular item referred to.

The Court: Read it again.

(Testimony of Walter W. Oakland.)

The Witness: "Furnish labor and material to repair circulating system of main engine as necessary."

Q. Do you know whether a shop order was issued covering the cleaning and testing of the heat exchangers and cooler that you have testified to here?

A. They were going to. I understand from the office they were going to issue an order and then they changed it and said it wasn't necessary, that it would come under——I think it was item 10.

Mr. Howard: I object to this witness testifying further as to that. He has testified they turned on the water, and then he is talking about their doing so and so. It is obviously hearsay and is not tied in [1267] with whoever it may be.

The Court: The objection is sustained.

Make it definite with questions or see that the witness is definite in his answers.

Q. In your last answer, you were referring to "them". Whom did you mean?

A. I mean the engineroom crew.

Mr. Hokanson: You may examine.

Cross-Examination

By Mr. Howard:

Q. How many men do you presently have working under you in the pipe shop?

A. Right at the present, I have four.

Q. Do you recall how many men were working under you in August or September of 1948?

(Testimony of Walter W. Oakland.)

A. I think there were eight, six or eight, I have forgotten just which. I believe it was eight.

Q. In the pipe shop? A. In the pipe shop.

Q. You are the foreman of that shop?

A. Yes, sir.

Q. What brings back to your memory so distinctly these coolers off the Tanker Urania?

A. Well, just merely that I know I remember the heat [1268] exchangers and coolers on the auxiliaries and the main engine.

Q. You say that there were two heat exchangers and a lubricating oil cooler brought to your shop?

A. Three?

Q. Two heat exchangers and a lubricating oil cooler were brought to your shop? A. Yes.

Q. Were some others brought, too?

A. I am kind of hard of hearing.

Q. Were some other heat exchangers or coolers brought from the Urania?

A. Yes, from the auxiliary engines.

Q. How do you know they were from the Urania?

A. Because the second engineer brought them up.

Q. Who brought up these two heat exchangers and the lubricating oil cooler you first spoke about?

A. They were brought up by the crane crew under the direction of the chief engineer.

Q. The crane crew? The employees of the yard brought them up, didn't they? A. Yes, sir.

(Testimony of Walter W. Oakland.)

Q. You say the chief engineer told you 50 pounds test pressure? A. 50 pounds. [1269]

Q. How did he communicate that to you?

A. He says, "You clean and press." I says, "How much pressure?" He said, "50 pounds." I says, "Okay." That is the words that he used as near as I can remember.

Q. Did you ever see the operation manual covering the maintenance procedure on the Harrison coolers aboard the Tanker Urania?

A. No, I didn't.

Q. Do you know how much pressure is prescribed for testing the coolers on the Tanker Urania in the maintenance manual?

A. I don't know that, because I got my information from the chief. It was all under the direction of the chief.

Q. Was it written out for you, or was it all oral?

A. Beg pardon?

Q. Was it written out, or was it all oral?

A. All oral.

Q. How long was Mr. Gallagher present during this testing?

A. Oh, I suppose five minutes or so, maybe ten minutes, I don't know. He looked the thing over with the second engineer. He was there with the second at the time.

Q. Just five or ten minutes that Mr. Gallagher was there?

(Testimony of Walter W. Oakland.)

A. I didn't check the time on it. They just come in [1270] and looked at it.

Q. How many air lines do you have in your pipe shop?

A. Four, I think, four outlets altogether.

Q. You hooked up one of these heat exchangers and put a test on it, is that right?

A. With water, yes.

Q. And then you hooked up another one?

A. Yes, sir.

Q. Afterwards? A. Afterwards.

Q. And then you hooked up another one, is that right? A. That is right.

Q. And then you had some heat exchangers for the auxiliaries that you hooked up and tested, is that right? A. They were done before this.

Q. Was Mr. Gallagher present when those were hooked up and tested?

A. Yes, he looked at them all.

Q. Did Mr. Gallagher tell you how much pressure to put on those heat exchangers when they were tested? A. No.

Q. You are sure you didn't get any information from Mr. Gallagher on it?

A. He didn't tell me any pressure.

Q. Was Mr. Gallagher present when each of these heat [1271] exchangers or lubricating oil coolers was tested, as each of these heat exchangers was tested? A. Yes, sir.

Q. I thought you said you went down to the

(Testimony of Walter W. Oakland.)

ship and got the chief engineer to send the second engineer up while one of these was being tested?

A. I put the test on and looked over the test while the pressure was on. I left the pressure on, went down to the boat and got the engineer and brought him up, and Mr. Gallagher, and they looked at it at the same time.

Q. How long did that take?

A. At least 15 minutes or so.

Q. Mr. Gallagher was not present all that time, was he?

A. He was in the yard all that time.

Q. Well, he wasn't up in the pipe shop watching the test of the coolers all this time, was he?

A. Not all the time. He came up with the engineer; the two of them came up together.

Q. You had already had the test on the first cooler before he got up there? A. Yes, sir.

The Court: What purpose would be served by your testing for pressure or applying pressure of 50 pounds? What purpose would that serve?

The Witness: Your Honor, it is to see——to locate [1272] if there is any leaks between the salt water and the lube oil on the heat exchangers, between the salt water and the fresh water.

The Court: Did you do any manufacturing or repairing on those exchangers or that cooler?

The Witness: Nothing excepting what we called zinc pencils or plugs made up to put in there.

(Testimony of Walter W. Oakland.)

The Court: How did you put them in? Where did you put them?

The Witness: On the side of the cooler, there is an outlet tapped for three-quarter inch pipe with a plug in it, and on the inside end of the plug, we put a zinc stick, a zinc rod five-eighths or three-quarters of an inch in diameter, one or the other, whatever it happens to be, and the length you can get in there. You fasten this zinc plug to the pipe plug and screw it in there so the zinc is right in the flow of the salt water.

The Court: Why?

The Witness: To do away with the galvanic action, to counteract the galvanic action.

The Court: Action of what?

The Witness: Of the salt water with the metal that the cooler is made of.

The Court: What kind of metal is it made of? [1273]

The Witness: The casing was bronze. I don't know what the core was made of; it looks like it might be bronze.

The Court: How long will that zinc pencil that you put in there last?

The Witness: Well, sometimes I have seen them ——they would last probably six months. They generally carried them on board ship.

The Court: What was the process that consumes it or wears it away?

(Testimony of Walter W. Oakland.)

The Witness: It is the galvanic action in the salt water that wears it away, eats it away.

The Court: If it were iron, what would be the process?

The Witness: It would probably rust.

The Court: Is rust the same as oxidization?

The Witness: That is right, sir.

The Court: If the metal being dissolved by the liquid agent or gasseous agent is zinc, the process becomes known as what?

The Witness: I don't know what the correct name for it is.

The Court: Have you used any name already with reference to it?

The Witness: No. [1274]

The Court: What is the galvanizing process? What is that?

The Witness: The galvanic action, they tell me, is caused by air and salt water.

The Court: On what kind of metal?

The Witness: Especially where you have steel or copper and brass together.

The Court: What about zinc? Does it affect zinc?

The Witness: The galvanic action——you use the zinc to counteract galvanic action on the other metal.

The Court: That is the only repairing that you did, is it?

The Witness: That is all.

(Testimony of Walter W. Oakland.)

The Court: Did that cause any sediment in the lubricating oil?

The Witness: None whatsoever.

The Court: Is there anything from that action or process that would cause a sediment that would get into the lubricating oil and be deposited or wear against the gears?

The Witness: No, because this is on the salt water side and it couldn't get in the lube oil at all.

The Court: Is there anything you did in your servicing of those exchangers and that cooler which could have caused a deposit to be made available for [1275] contamination of the lubricating oil——

The Witness: Nothing at all.

The Court: ——that might result in depositing abrasives upon the gears?

The Witness: Nothing at all, Your Honor.

The Court: Are you sure of that?

The Witness: Yes, sir.

The Court: How can you be sure?

The Witness: Because all of the chemical—— the chemical being the Jamlen's solution, that is known as a lube oil cleaner, doesn't hurt any machinery whatever at all. It is made for that particular purpose.

The Court: Does it have any residue or sediment of any sort in it which could be transferred to the gears?

The Witness: No, it hasn't.

The Court: Are you absolutely certain of that?

(Testimony of Walter W. Oakland.)

The Witness: Not according to our catalogs and according to the instructions from their representatives.

The Court: What about according to your observation and experience? Have you seen or found any such sediment?

The Witness: No, I never have, Your Honor.

The Court: What have you to say with respect to the possibility of there being any such sediment, irrespective of what the manufacturer of the product [1276] says about it?

The Witness: Well, I couldn't imagine why there should be. Everything was cleaned out thoroughly as far as the coolers were concerned.

Q. Where were these coolers in the pipe shop when they were tested?

A. We had them sitting on the floor while we cleaned them, and then we set them up on the bench while we tested them.

Q. Were the coolers or heat exchangers immersed in water while you put air on them?

A. We didn't test them with air; we test with water.

Q. You fill them with water? A. Yes, sir.

Q. And then put air on them?

A. No, no air; put 50 pounds water pressure on them.

Q. Did you notice whether any test pressure was stamped on the heat exchanger or cooler?

A. No, I didn't.

(Testimony of Walter W. Oakland.)

Q. Did the chief engineer specify what cleaning fluid or what solution was to be used in cleaning these heat exchangers? A. No, he didn't.

Q. How many covers are there on one of these heat exchangers? [1277] A. Two.

Q. Where are they located?

A. One on each end.

Q. When you take those covers off, what do you see?

A. You can see the oil end of the lube oil cooler.

Q. Those are the only openings on the cooler, then?

A. No, you have the two flanges that comes off the side for the salt water.

Q. Those are on the side?

A. Yes, off what you might call the side, or the edge.

Q. Are there any other openings on the cooler?

A. Yes, there is a plate goes over the top, the opposite side from where the salt water goes in and out.

Q. What do you see when you take that out?

A. You just see the core.

Q. On which side? On the salt water side.

Q. Were those covers all removed when you cleaned the heat exchangers or the cooler?

A. You couldn't remove the covers while you were cleaning them. You had to leave those on, but after the cleaning is done, then you remove the covers.

(Testimony of Walter W. Oakland.)

Q. Were the covers removed when Mr. Gallagher was up there?

A. Yes, sir, on the lube oil side. [1278]

Q. Both sides? A. Both ends, yes, sir.

Q. And then plugged up again?

A. Put the covers back on again with the new gaskets.

Q. This 50 pounds pressure that you put on, you left that on, as I understand, while you went down to the ship and got the chief engineer to send the second engineer up, is that right.

A. Yes, sir.

Q. Did that pressure remain constant all that time? A. Yes, sir.

Q. Wouldn't that pressure reduce during that period?

A. Not if you didn't have leaks, it wouldn't.

Q. If you had leaks, would it reduce?

A. It would drop down, the pressure would drop down.

Q. It is conceivable that the pressure might have been much less on it when you got back up from the ship?

A. No, because it registered the same when we came back as it did when I put it on 50 pounds.

Q. Then you repeated the same process with each of the others? A. Yes, sir.

Q. Which did you do first, the lubricating oil coolers or the heat exchangers?

(Testimony of Walter W. Oakland.)

A. I think it was the heat exchangers first, as near [1279] as I can remember.

The Court: Was there any other work done in your shop on these parts?

The Witness: No, Your Honor.

The Court: Did you see anyone else do any other work on anything that belonged to that engine or any attachment of the engine?

The Witness: In my shop?

The Court: Yes.

The Witness: No.

The Court: Did you see anything done anywhere else in the yard?

The Witness: No, not on those heat exchangers or lube oil coolers. Of course, Your Honor, we had all kinds of parts of machinery that we were working on in different parts of the yard, but all under direction of the engineer.

Q. You have referred to the last item on that sheet shown as Libelants' Exhibit 4, "Furnish labor and material to repair circulating system of main engine as necessary." Do you know how many hours of labor went into that work?

A. No, I don't.

Mr. White: Objection, Your Honor, on the ground it is not within the scope of direct examination.

Mr. Howard: If the Court please, they have examined [1280] this witness on this last item, what it involved.

(Testimony of Walter W. Oakland.)

The Court: The objection is overruled.

Q. Give us your best estimate, if you can, of the number of hours of labor that went into that work?

A. Altogether on that circulating system there must have been——

Mr. Hokanson: If you know.

A. ——probably four days.

Q. Did you do the work yourself? A. No.

Q. Did the men working under you in the pipe shop do the work? A. Yes, sir.

Q. How many men? A. Two men.

Q. Two men, four days? A. Yes.

Q. That is your best recollection?

A. That is as near as I can remember.

Q. Did they put in a full day, each of them?

A. It has been so long ago, I can't keep a reference on all of these items.

Q. How about materials? Were you required to use any materials on that job?

A. Pipe flanges and flex hose and some fittings.

Q. What is your estimate of the value, cost of that material?

Mr. Hokanson: Now we are getting back into the libel. This has nothing to do with the libel. He is getting into questions of value. This is the cross libel we are trying now. This witness hasn't testified to anything concerning values on direct examination.

The Court: For what purpose?

(Testimony of Walter W. Oakland.)

Mr. Howard: I am testing the recollection of the witness as to what was involved in the last item on Libelants' Exhibit 4.

The Court: Overruled.

Q. Do you recall the question?

A. I wouldn't know the cost on any of that, because I don't have the access to the prices.

Q. There were absolutely no leaks found in any of these coolers that were on test?

A. No, sir.

Q. Did you ever suggest that they be tested at a higher pressure?

A. No. My orders were to do this work under direction of the chief engineer or his assistants, and that is as far as I went with it.

Q. You never saw the test pressure stamped on the cooler? [1282]

A. I didn't stop to look at it on account of the chief engineer give me the orders, what he wanted tested, and I done it according to his orders.

Q. If there had been a test pressure stamped on there, would you have seen it?

A. I would have seen it, probably. If I had examined the coolers I might have found a name plate on it.

Q. Didn't you examine the cooler to see if there was some leaks?

A. Not for the name plate. You don't have the name plate on that end of the cooler.

Q. So your statement to us now is that if there

(Testimony of Walter W. Oakland.)

had been a stamp on there as to the test pressure on the heat exchangers or coolers, you would have seen it?

A. I could have seen it if I had looked for it.

Q. But you weren't looking for it?

A. I wasn't looking for it.

Mr. Howard: That is all.

Redirect Examination

By Mr. Hokanson:

Q. After you ran the Jamlen solution through the lubricating oil chambers or tubes, was anything else done in connection with the cleaning process?

Mr. Howard: That is objected to as repetitious and not proper redirect examination. He already went into that, if the Court please, on direct examination.

Mr. Hokanson: Your Honor, I am merely asking the witness to testify as to this matter which was developed by Your Honor in questioning the witness concerning the possibility of——

The Court: The objection is sustained.

Mr. Hokanson: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Hokanson: Mr. Woodman.

HAROLD L. WOODMAN

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please.

A. Harold L. Woodman.

Q. Where do you live?

A. At Winslow, Washington. [1284]

Q. What is your occupation?

A. I am a machinist foreman with the Commercial Ship Repair.

Q. How long have you worked for Commercial Ship Repair in that capacity?

A. Since they bought the yard, I guess about 15 or 16 months.

Q. What previous experience had you had as a machinist prior to that time?

A. I worked at the machinist trade since about 1917. In 1937 I was made shop foreman for the Winslow Marine Railway & Shipbuilding Company and continued in that capacity until Commercial Ship Repair bought the yard.

Q. Have you ever been to sea?

A. Yes, sir.

(Testimony of Harold L. Woodman.)

Q. Do you hold any licenses?

A. I hold a steam engineer's license, first assistant, ocean.

Q. Were you working as machinist foreman at the Winslow yard during the months of August, September and October, 1948? A. Yes, I was.

Q. Do you recall the Motor Tanker Urania?

A. Yes.

Q. Did you know Mr. Harry Williams? [1285]

A. Yes, I did.

Q. Did you know the chief engineer of the vessel? A. Yes.

Q. Did you ever have conversations with him?

A. Yes, I have.

Q. Were you able to converse with him at all?

A. Fairly well, not too well. He had trouble understanding me and I had some trouble understanding him, but we got along together with the work quite well.

The Court: Who was that?

The Witness: The chief engineer of the Urania.

Q. Did you ever discuss with Mr. Harry Williams the main engine work on the Urania?

A. Yes, I discussed some phases of it with him.

Q. With respect to what?

A. With respect to the work that the engineers were doing, some of it was. Most of it was pertaining to the work that the engineer requested we help them out on.

Q. Did you have any understanding with Mr.

(Testimony of Harold L. Woodman.)

Williams concerning what you should do on the main engine?

A. Yes, I would say we had an understanding to the extent that he wanted——he asked if we could furnish him mechanics that would work with the engineer force of the ship.

Q. What was the engineer force of the ship, if you know?

A. Do you mean who did it consist? [1286]

Q. Yes.

A. There was a chief and I think three assistant engineers, and I don't know whether there was any more than that. I think there were more than that, too, but I didn't know them or pay any attention to them.

Q. Pursuant to Mr. Williams' discussions with you, did you ever furnish any machinists to the chief engineer? A. Yes.

Q. Do you know what they did?

A. No, not what they did. I know that they worked with the assistant engineers, at their direction. I had no direct supervision over them other than to furnish them to the engineering force of the ship.

Q. Do you remember when the Urania first came into the yard?

A. I can remember when——I don't remember the date or anything like that. I do recall when she came in, though.

(Testimony of Harold L. Woodman.)

Q. What was the state of the main engine when she came in, if you know?

A. I didn't pay any particular attention. I believe there were some parts of it dismantled when she came in.

Q. Do you know who was aboard her at that time?

A. There was the engineers, some of them——I don't know how many of them were aboard at that time. There were also a couple of mechanics from Seattle that came along [1287] with the ship.

Q. In the main engineroom? A. Yes.

Q. How long did they work there, if you know?

A. No, I don't know. I presume it was possibly a week.

Q. Were they employees of Commercial Ship Repair? A. No, they were not.

Q. Do you know where they were from?

A. I found out later that they were employees of Foss Tug & Barge Company.

Q. Did you have anything to do with the installation of the liners on the cylinders of the main engine? A. Yes.

Q. What was that?

A. We installed the liners in the cylinders up in the company's warehouse where we had provisions to handle them——that is, our machinists did that.

Q. Would you state what liners are?

A. A liner is——I would say is an inner lining,

(Testimony of Harold L. Woodman.)

a portable lining of a cylinder, generally installed to facilitate replacement readily. The piston runs in the liner, the liner is installed inside of the cylinder casting itself.

Q. So that it is the same shape as the cylinder, cylindrical in shape?

A. Cylindrical in shape, and in line with the engine proper.

Q. What is it made of? A. Cast iron.

Q. Do you know who put the cylinders on the main engine?

A. Yes, the shipyard riggers took the cylinders from the warehouse and lowered them into the engine room and placed them on the engine with the shipyard chain blocks and gear necessary to do it with.

Q. With respect to these liners, were they new?

A. I can't say that they were new. I don't know whether they were or not. I don't think so.

Q. Were the liners in the cylinders when the cylinders were lowered on the engine?

A. Yes, they were.

Q. Were you present when that was done, when the cylinders were placed on the engine?

A. Yes, I was down there and saw one or two of them. I was on board the ship and happened to watch the proceedings.

Q. Was anything further done with respect to the cylinders and liners beyond what you have already stated?

(Testimony of Harold L. Woodman.)

A. Not by the shop or the shipyard crew.

Q. Did you or your crew have anything further to do [1289] with it when you were present?

A. No.

Q. Do you know anything about some difficulties that were experienced with the lubricating oil terminal on the No. 2 cylinder? A. Yes, I do.

Q. Would you state what that is?

A. No. 2 cylinder, when the ship's force—— after they had bolted them down and were in the process of assembling the engine, they wanted to put these lube oil terminals through the cylinder and into the cylinder liner itself.

Q. When you say "they", whom do you mean?

A. The ship's force. They found that the holes in the liner and the cylinder were slightly out of line so that the terminal could not be screwed in the way——in the position they were in.

Mr. Howard: I don't like to interrupt, but did you say "they found" or "I found"?

The Court: They found, the ship's force.

The Witness: They, that is right. The chief engineer came up to the machine shop and asked me if I would walk down to the ship with him and see what could be done to enable these tubes to be put in the engine properly, and I told him what could be done, and he asked me to send a man down to do it. [1290]

Q. What was done, if you know?

A. We filed out the side of the hole on the

(Testimony of Harold L. Woodman.)

cylinder casting possibly one-sixteenth of an inch so that the terminal pipe would screw into the threads of the liner properly.

Q. Who was present when that was done?

A. The mechanic that worked on it and the engineer force. The chief was there and watched the proceedings part of the time.

Q. Were you there?

A. I was there when they started it, yes.

Q. Was anything further done with respect to terminals, so far as you know, by any of your machinists?

A. No. My machinist, the machinist I sent down there, tried the terminal into the hole. It fit properly and he left it right there.

Mr. Howard: If the Court please, I object to that answer on the basis of what his machinist did, because the witness has just got through saying he was only there when the work started.

The Court: Were you there when it was finished?

The Witness: No.

The Court: The objection is sustained.

The Witness: If I might add, I did see the job after it was completed, but I wasn't there when the [1291] job was in the process of being done.

Mr. Howard: I don't think that is responsive to any question.

The Court: It is stricken.

Q. Did you see the filing on the cylinder jacket

(Testimony of Harold L. Woodman.)

after the job was completed? A. Yes, I did.

Q. And that filing-out process was on the outside of the cylinder, as I understand it?

A. Yes.

Q. Did you ever have anything to do with the telemotor system on the Urania?

A. Yes, I did.

Q. Can you tell us what that was?

The Court: What does that do? What function does the telemotor perform?

The Witness: It controls the steering engine. We followed a job order issued by the yard on examination of the telemotor system and steering engine.

The Court: What do you mean, "we followed a job order"?

The Witness: I don't know what the job order ——I can't recall.

The Court: What was the nature of your activities if you followed the job order? What would be the nature [1292] of your activities, that you read the job order and went home? If it means that or something else, will you say what it means and the nature of the meaning?

The Witness: We were to examine mechanically the steering engine and its parts.

The Court: May I ask you this: does it or does it not mean that you did or undertook to do what the job order called for?

The Witness: That is correct, sir.

(Testimony of Harold L. Woodman.)

The Court: All right. Proceed.

Q. Do you recall what that was, Mr. Woodman?

A. Yes. We checked the steering engine to see that it was in proper working condition, the steering engine and the telemotor also. We had to work on the telemotor to see that the steering engine functioned properly.

Q. What did you find?

A. We found out that it worked properly.

Q. Did you go on the sea trial of the vessel on October 6? A. I did not.

The Court: May I ask you, did you find that out without doing any work on it or did you find it out after you did work on it?

The Witness: We did work on it sir, did some work on it. [1293]

The Court: I do not know anything about what you are talking about except what you tell me.

The Witness: I realize that, sir. We did examine the steering engine very carefully, tried out the hand steering gear and saw that there was no mechanical defects apparent in the engine itself; tried the telemotor out for the steering engine controls and found them working properly, left them working properly, I should say.

The Court: I have not heard of any work being described. Do you know how to get the witness to talk about that?

Mr. Hokanson: I will, Your Honor.

(Testimony of Harold L. Woodman.)

Q. What did you do when you first tested this system out?

A. We checked the oil in the telemotor system, added a little to it and worked the system from there. It is rather hard for me to describe just what we did.

Q. What is the telemotor, Mr. Woodman?

A. The telemotor is a part of the steering equipment aboard the ship that actuates the steering engine itself.

Q. On what principle does it work?

A. On the hydraulic system.

Q. What happens when you turn the wheel in the wheelhouse on the telemotor? [1294]

A. You turn the wheel in the wheelhouse——it is directly connected to a couple of pistons.

Q. What do they do?

A. Those pistons in turn are connected by tubing to pistons at the steering engine station.

Q. What is in the tubing? A. Oil.

Q. When you actuate those pistons from the steering wheel, what happens then?

A. It actuates the electrical controls on the steering engine itself.

Q. Where is that located?

A. In the steering engineroom.

Q. What does that do?

A. It starts the steering engine motor and turns the rudder one way or the other, whichever way, depending which way you turn the wheel.

(Testimony of Harold L. Woodman.)

Q. Can you describe very briefly what you did to test out this system to see whether it was in proper working order?

A. Will you state that question again, please?

(Last question read by reporter.)

A. To test out the system, we tried the steering gear in its entirety for a period of probably two or three hours, moving the rudder from port to starboard, back and forth [1295] and amidships, and found out that it was working properly that way.

Q. Did you check the oil in the system?

A. Yes, we did.

Q. Did you find the system to be in proper working order? A. Yes.

The Court: Was the workability of the system any different after you got through checking it from what it was before you started checking it, so far as your adding or subtracting anything to the parts or contents of the parts was concerned?

The Witness: We couldn't run the steering engine, sir, until we had tried out all the telemotor system, the hydraulic system, as we call it, with the oil in it and——

The Court: So it was not working when you started it, is that right? It would not work when you started it?

The Witness: No, sir, it wouldn't.

The Court: You did something to it to make it work?

The Witness: Yes, we checked it over.

(Testimony of Harold L. Woodman.)

The Court: What did you do to make it work that was not already done before you started?

The Witness: To start with, the electricians did some work checking the wiring on the motor.

The Court: Did they put in any new wires?

The Witness: No, not that I know of. I believe they did hook up some wires that were disconnected on one phase of it.

Mr. Hokanson: We have another witness on that phase of it, Your Honor.

The Witness: But our work was principally concerned with lubricating the system to see that the bearings were cleaned, the gears were cleaned and that——

The Court: The Court does not feel that the Court understands that there has been a thing done to explain what it was that accomplished a change in the condition of this telemotor.

I understood him to answer a few moments ago that the thing would not work when he commenced, and he worked with it and made it operate and function. What was the specific thing and nature of the work done which produced that result? That is what I would like to know, if you can get it out of the witness, briefly.

Q. What did you have to do to make it run?

A. We had to put oil in the telemotor lines. We had to see that the telemotor would actuate by turning the steering wheel. We had to get power on the motor; we had to oil up the machinery; we

(Testimony of Harold L. Woodman.)

had to take out the stop. There [1297] is a stop on the rudder quadrant to keep it from swinging back and forth if the engine is not hooked up or if the boat is being towed. We removed that and oiled up the bearings, examined them so they were in proper working order. When we got the power on the motor, we tried the steering gear out electrically and found it in working order.

Q. In other words, this system had not been operating for some time before it came into your control? A. That is right.

Mr. Howard: I object to that as something that is obviously beyond his knowledge. He can't say whether it had been operating or not.

The Court: Read the question.

(Last question read by reporter.)

Mr. Howard: I renew my objection.

Mr. Hokanson: I will rephrase the question.

Q. Could you tell from the condition of the telemotor when you first saw it whether it had been in operating condition recently?

A. I could tell that the telemotor and steering engine had not been operating for some time due to being no power on the ship.

Q. In the course of your opening up this system to get it in working order, was it necessary to effect any repairs to any parts of it? A. No.

Q. When you finished the job, was it in operating order? A. Yes, it was.

(Testimony of Harold L. Woodman.)

The Court: Ask him once more what the nature of his work was. What did he do to the thing?

Q. Would you explain to the Court once more just exactly what you did to get the system operating when it had been inoperative prior to the time the ship came in the yard?

A. The first thing we did was to try out the hand steering gear, which is done in the steering engine itself. That is controlled by hand with a steering wheel aft of the steering engine. We found out that that worked and that the rudder turned freely on the ship.

The Court: Then you did not do anything to that? Why do you mention it if you did not do anything to that to change its condition?

The Witness: We didn't. It was only to find out——

Mr. Hokanson: Your Honor, may I explain this?

The Court: The witness is on the stand.

Mr. Hokanson: There is an exhibit in the record, Your Honor, covering the particular item of the main contract covering the telemotor. I will ask that that [1299] exhibit, Libelants' Exhibit 1, be produced and ask the witness to read that for the Court's information.

Q. Examine that Exhibit No. 1 and tell me what you find under the heading "steering engine".

A. "Test out steering engine and steering gear and report condition found. Free up and lubricate

(Testimony of Harold L. Woodman.)

mechanical equipment found in good order. Remove locking device from rudder before testing."

Q. What does that mean?

A. That means to try out the steering engine to see if it will run.

Q. Did you do that? A. I did.

Q. Did it run? A. Yes, it did.

The Court: Did you do anything else to it? Did you add anything to it or subtract anything from it?

The Witness: We put in a little oil in the telemotor system.

The Court: Was it lubricating oil?

The Witness: It was telemotor oil, a special oil manufactured for that purpose.

The Court: As I understand it, it was not put in for the purpose of lubricating and freeing the action and preventing wearing of the parts, but it was put in [1300] for the purpose of producing motion in the parts, is that right?

The Witness: That is right, Your Honor.

The Court: Was it an approved grade and quality and kind of oil?

The Witness: It was given to us by the chief engineer of the ship to use in the telemotor.

The Court: Did he ask you to use that kind?

The Witness: Yes, he did, sir.

Q. Did you have anything to do with the Clayton boiler on that ship?

(Testimony of Harold L. Woodman.)

A. Yes, we had the pump from the Clayton boiler up in the machine shop.

Q. What is the pump?

A. The pump on the Clayton boiler is a series of pumps. One is a fresh water pump, pumps the water into the boiler. I think there are four pumps, four independent pumps in the unit. I don't know exactly what all the pumps do on that or their function.

Q. What did you do to that pump?

A. We had it up in the shop, dismantled it, disassembled it, and we renewed two or three pieces in it. I believe we renewed the crankshaft, or camshaft, as they called it. The chief engineer requested we put in a spare he had aboard the ship, and I believe there were a couple of [1301] bearings that he had aboard the ship that we put in along with the camshaft.

Q. Was that done under your supervision?

A. Yes, it was.

Q. Does the Clayton boiler have anything to do with the main engine? A. No, sir.

Q. Who reassembled the pump after these parts were put in?

A. Machinists in the shop under my direction.

Q. Did you see it done?

A. I saw part of it done.

Q. What is your practice with respect to reassembling parts of a pump or any other item of machinery after it has been taken apart?

(Testimony of Harold L. Woodman.)

A. It is to reassemble it in its proper order.

Q. How do you do that?

A. Ordinarily, check the machinery and if there are identification marks on the parts, you take note of them. If there are not, you put identification marks of your own so they will go back in their proper places.

Q. Do you remember anything in particular about the pump of this Clayton boiler?

Mr. Howard: That is a broad question.

Mr. Hokanson: I will withdraw the question.

Q. Do you know whether that practice was followed with respect to the reassembly of the Clayton boiler pump? A. Yes, it was.

Q. Did you ever see that pump in operation aboard the ship after you had reassembled it in the shop?

A. I don't believe I did, no, sir.

The Court: At this time we will take a ten-minute recess.

(Recess.)

Q. Did you ever discuss the telemotor system at the Winslow yard or aboard the Urania with any officers of that vessel? A. Yes, I did.

Q. When?

A. Sometime before the ship left; I imagine possibly a week before the boat left.

Q. With whom did you discuss it?

A. With the captain, the chief engineer, and the chief mate.

(Testimony of Harold L. Woodman.)

Q. What was the nature of the discussion?

A. The captain asked me if I would try to teach him or show him how the steering gear worked, how it operated. I was down there on a Saturday forenoon for about, I would say two hours or two and a half hours and showed him how to use the telemotor steering, how to transfer from the [1303] telemotor steering to the manual steering and how to engage the hand steering gear down in the steering engineroom and how to disengage it. I worked the systems, that is the telemotor system and the manual control system, for him, back and forth to switch from one to the other, I would say 15 or 20 times, and I had them do it after I did it, both of them, the mate especially.

Q. When you say "them" do you refer to the mate and the captain?

A. The mate and the captain. The chief engineer wasn't interested in the steering up in the pilot house. He would watch the operation of the steering quadrant, rudder stock, and so on down in the steering engineroom.

Mr. Hokanson: You may examine.

Cross-Examination

By Mr. Howard:

Q. You could make yourself understood all right to the chief engineer, couldn't you?

A. Yes, fairly well.

Q. And he could talk to you all right, couldn't he?

(Testimony of Harold L. Woodman.)

A. Yes, we got along fairly well.

Q. Referring to item 1 on Libelants' Exhibit 4, on the first page, "furnish labor and material to pull main engine cylinder liners," did you furnish that labor and [1304] material?

A. Yes, we did.

Q. Going about one-third of the way down the page, "Install new liners in 5 cylinders," did you furnish that work? A. Yes, I did.

Q. And the labor that went into it?

A. Yes.

Q. The shipyard furnished that?

A. That is right.

Q. Just about in the center of the page, an item, "Install 6 cylinders on engine."

Q. Did you furnish the labor and material for that? A. Yes.

Q. The labor for that?

A. The labor for fitting the cylinders on the engine.

Q. The item is "Install 6 cylinders on engine."

A. That is right, sir.

Q. As to this terminal leading into No. 2 cylinder, did you see what kind of a gasket was put in there? A. No, I didn't.

Q. Referring now to the telemotor system, did you make any adjustments at all in the motor in the steering engineroom? [1305]

A. No, I didn't.

(Testimony of Harold L. Woodman.)

Q. Did you make any repairs to the motor in the steering engineroom?

A. I did not, no, sir.

Q. Did you do the work on that yourself?

A. No, I didn't.

Q. Someone under your direction did the work?

A. If there was any electrical work done, it was under the jurisdiction of the electric shop, not my charge.

Mr. Howard: I have no further questions.

Redirect Examination

By Mr. Hokanson:

Q. What was involved in installing the cylinders on the engine?

Mr. Howard: That is objected to as improper redirect examination.

Mr. Hokanson: I think it is proper, Your Honor.

The Court: It is overruled.

A. The yard lowered the cylinders down into the engineroom through the engineroom skylight and set them on the engine case itself; just set the No. 1 cylinder in its position, No. 2, No. 3, the six of them in position and dropped them down over the studs. We left them there and the ship's force took over from there. They bolted the [1306] cylinders to the frame of the engine. The ship's force did that.

Mr. Howard: I move to strike the last part of the answer as not responsive to the question.

The Court: It is granted.

(Testimony of Harold L. Woodman.)

Q. You had to use riggers to put those cylinders down, is that it? A. That is right.

Q. And the ship didn't have that equipment?

Mr. Howard: Objected to as leading.

The Court: Sustained.

Q. Did you have anything to do with installing the oil leads into the cylinders and the liners?

A. I did not.

Q. Did anyone under your supervision have anything to do with it?

A. No, they did not.

Mr. Hokanson: That is all.

Mr. Howard: That is all.

(Witness excused.)

The Court: Call the next witness.

Mr. Hokanson: Mr. Gilmore. [1307]

J. D. GILMORE

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please.

A. J. D. Gilmore.

Q. Your residence?

A. 4515 Woodlawn Avenue, Seattle.

Q. Your occupation?

A. Marine surveyor.

(Testimony of J. D. Gilmore.)

Q. What is your experience as a surveyor?

Mr. Howard: We will concede that Mr. Gilmore is a qualified marine surveyor in the Pacific Northwest area.

Q. What licenses do you hold?

A. Chief engineer, United States Coast Guard, any tonnage, any ocean; British, second class engineer; certified professional engineer, marine engineering and surveying, from the State of Washington.

Q. What company are you associated with?

A. Alexander Gow, Inc.

Q. Did you attend the vessel Urania at Winslow in the [1308] month of October for Mr. Black and Mr. Featherstone? A. I did.

Q. Did you ever see the Urania prior to the time you made that visit? A. I did.

Q. Do you know anything from your own knowledge concerning the condition of the vessel at the time she came into that yard?

A. Not at the time she came into the yard, but subsequently.

Q. What was that condition?

A. I saw a number of cylinders in the stockroom that were cracked from top to bottom, and they told me that they had been removed from the main engine of the Urania on account of freezing and cracking.

Mr. Howard: I object to that, as to what they told him. He hasn't identified them. It is purely a hearsay statement.

(Testimony of J. D. Gilmore.)

The Court: It will have to be sustained.

Q. Do you know from any other personal observation what the condition of that vessel was prior to her conversion?

A. I made no survey of her prior to the conversion; however, I was aboard the vessel in company with Mr. Williams for other purposes later on.

Q. Did Mr. Williams ever say anything to you concerning the history of the vessel?

A. I can't recall.

Mr. Howard: I would like to establish that this witness is referring to the same Mr. Williams that we have in mind.

The Witness: Mr. Harry Williams, who told me that he represented the owners for certain purposes, showed me a telegram signed by the owners.

Q. Did you ever discuss with Mr. Williams the history of that vessel?

A. I can't recall that. I think in a casual conversation I asked him what happened, and as far as I can recall, he says, "She froze in Alaska," but I was not interested in the machinery.

Q. You have been in court this afternoon since 1:30, have you? A. Yes, I have.

Q. Did you hear the testimony of Mr. Oakland concerning the test that he conducted for the purpose of cleaning and hydrostatically testing the coolers and heat exchangers on that ship?

A. I did.

Q. How long have you known Mr. Oakland?

(Testimony of J. D. Gilmore.)

A. Somewhere along in 1923 or 1924, I would imagine, [1310] when he was at Winslow and we had vessels over there under repair.

Q. Do you know anything about Mr. Oakland's ability as a pipe shop foreman?

A. I have always found him—he gave me most satisfactory work.

Q. Having listened to his testimony concerning how he conducted the cleaning and testing of these heat exchangers and coolers, what is your opinion concerning the method he used?

A. I think it was good, standard——

Mr. Howard: I object to the form of the question in that there has not been a sufficient basis laid for the question to be propounded to this witness as to his opinion of the manner in which this work has been done.

The Court: Do you mean there might be some uncertainty as to what part of the testimony he considered?

Mr. Howard: That is correct.

The Court: I think you should state the part of the testimony you wish to call his attention to. If he heard it all, he may be emphasizing something that is not material.

Mr. Hokanson: In order to shorten this, Your Honor, I will ask the witness the question in this form: [1311]

Q. Did you hear what Mr. Oakland had to say about the method he used in cleaning and testing

(Testimony of J. D. Gilmore.)

the heat exchangers and the cooler of the Urania?

A. I did.

Q. What is your opinion concerning the method used?

Mr. Howard: I renew my objection. This witness has not yet testified that he is familiar with this type of heat exchangers or the requirement for testing them.

Mr. Hokanson: You have already conceded his qualifications as a surveyor.

Mr. Howard: As a surveyor, but not that he has knowledge of this type of heat exchanger or lubricating cooler.

The Court: The objection is sustained.

Q. Are you acquainted with a Harrison type radiator or heat exchanger? A. I am.

Q. Is your familiarity with that type of heat exchanger such that you understand the method of cooling involved in that system? A. It is.

Q. On that basis, are you able to state an opinion as to the method used by Mr. Oakland in cleaning and testing the coolers and heat exchangers?

The Court: As used by him according to what he [1312] stated.

Q. According to what he stated.

Mr. Howard: This witness has been asked whether he is familiar with the method of cooling, and I submit to Your Honor that that is not the proposition we are involved with here. It is the method of cleaning.

(Testimony of J. D. Gilmore.)

The Court: I sustain the objection. I understood that witness referred to as testifying to his method of cleaning the exchangers.

Q. Have you ever had a Harrison heat exchanger or cooler cleaned?

A. I can't recall that I ever had a Harrison heat exchanger cleaned. I have had many other heat exchangers of similar construction.

Mr. Howard: I move to strike the last part of the answer as not responsive.

The Court: Sustained. Just answer the question.

Q. Do you know anything about the Jamlen solution which is used in cleaning pressure vessels?

A. I do.

Q. What is its reputation for effectiveness in doing that kind of work? A. Excellent.

Q. Do you know what the American Bureau standards are with respect to pressure testing pressure vessels? [1313]

Mr. Howard: I object to that question as not being—I think counsel may have misstated himself.

The Court: It seems to me you misstated yourself or insufficiently stated the condition.

Q. Do you know what the American Bureau of Shipping requirements are with respect to the amount of pressure to be put on coolers or heat exchangers in testing?

Mr. Howard: I object to that question in that it deals with coolers and heat exchangers in general.

(Testimony of J. D. Gilmore.)

We have before us a particular type of heat exchanger or cooler, and I think the question should be limited to that type.

The Court: The objection is sustained.

Mr. Hokanson: I will withdraw the question.

Q. Mr. Gilmore, you know——

The Court: Ask him if he does; do not say that he does.

Q. Do you know the characteristics, the construction of the Harrison heat exchanger?

A. I do.

Q. Assuming that a Harrison cooler or heat exchanger has a rated operating pressure on the salt water side of 7 pounds; and assume that it has a rated operating pressure of 18 pounds on the lubricating oil side: based on those facts and upon the statement of Mr. Oakland concerning the [1314] method he used in cleaning and testing the Harrison coolers and heat exchangers, what is your opinion with respect to the method used?

Mr. Howard: I object to that question on the ground it does not contain sufficient assumptions from the evidence that is now in the record in this case. I am particularly referring to the fact that testimony is in this record to the effect that there is a stamp on this particular cooler aboard the Tanker Urania that has a test pressure of 300 pounds per square inch on the salt water side. That testimony is undisputed in the record at this time, if the Court please.

(Testimony of J. D. Gilmore.)

Mr. Hokanson: There is in the record the operating manual issued by The Union Diesel Engine Company. Mr. Newell, the vice president of that company, pointed out in the manual, which is in evidence, the place where it sets forth the operating pressures. That is what we are concerned with here, the operating pressure of this particular radiator, and I submit that all of the basic assumptions are present here necessary to get the answer from the witness. He knows the radiator; he knows that the pressure——

The Court: You can state what you contend is further in the evidence. I believe that this other is a fact which the evidence does disclose, or at least I have [1315] heard referred to before as a fact, and the objection is sustained with leave to add such other elements as the evidence discloses.

Q. Assume further that the plate on this exchanger gives a pressure test of 300 pounds; and assume further that the maximum working pressure is 75 pounds; and assume further that the chief engineer, at whose request the cooler was cleaned, asked for a test of 50 pounds water pressure on the salt water side: do you have an opinion as to the propriety of the method used in this case?

The Court: As stated by whom?

Q. As stated by Mr. Oakland.

A. I think it was a good, fair pressure test.

Q. Is it good marine practice to test them in that fashion? A. It is.

(Testimony of J. D. Gilmore.)

Q. Was it cleaned properly if Mr. Oakland's testimony is correct?

A. That is the standard practice of cleaning any heat exchanger, not only a lubricating oil cooler, but a fuel oil heater.

Q. You state that you are acquainted with a Harrison radiator or heat exchanger. Do you know whether it is used for more than one purpose, or can be used for more than one purpose on board a vessel? [1316] A. It can.

Q. What then does the test plate mean with respect to test pressures?

A. That would mean the maximum pressure that the heat exchanger was subjected to, and it would be safe for any working pressure up to that pressure.

Q. Assume that the operating pressure of the particular coolers and heat exchangers in question is 7 pounds on the salt water side and 18 pounds on the lube oil side: what is your opinion as to the amount of pressure to which the exchangers should be subjected for use under those conditions?

A. I would say one and a half times the 18 pounds, that is the higher pressure that is subjected to.

Q. Assume that the heat exchangers and cooler in this case have been cleaned and tested in accordance with Mr. Oakland's testimony; and assume that after the heat exchangers and cooler were so cleaned and tested they were put on the engine of the

Urania; and that thereafter the vessel travelled (Testimony of J. D. Gilmore.)
roughly 2400 miles and that during the voyage the operating pressures of 18 pounds on the lube oil side and 7 pounds on the salt water side of the exchangers and cooler were maintained and that the vessel operated in a satisfactory condition for a period of ten days and that thereupon the helical timing gears of the vessel became galled and that the lubricating oil had been changed the day before the first [1317] galling of these gears; and that after the gears were galled the vessel put into port, the oil was again changed, new timing gears installed, new oil put in the system; and that the vessel then put out to sea and was under way for a period of 36 hours when the gears went out again, the timing gears; and that thereafter the vessel returned to Los Angeles under tow and arrived there on or about November 11 when the heat exchangers and the cooler in question here were removed from the vessel, placed in a vat of caustic solution at a temperature of 212° Fahrenheit, boiled for four hours and then subjected to pressure tests under water with an air pressure of 160 to 200 pounds which then disclosed certain leaks around the seams of the cooler and not in the tubes themselves as evidenced by air bubbles the size of a pin point or the lead in a pencil, but that such leaks were not visible to the naked eye without such a test: in your opinion, could such leaks allow infiltra-

(Testimony of J. D. Gilmore.)

tion of salt water into the lubricating oil of that ship in any amount at all?

A. I do not think so.

Q. Assume further that during the voyage an auxiliary pump was used on November 4 for a period of approximately six hours so that the water pressure on the salt water side of the cooler was increased to 100 pounds: could that, in your opinion, cause infiltration of salt water in the lube [1318] oil through leaks of the size described?

Mr. Howard: I will have to object to that question on the basis that there is no testimony in the record that the water pump that was placed into the system on November 4 was carrying a pressure of 100 pounds. There is no testimony, if the Court please, in the record that that amount of pressure was being delivered through the system at this time.

Mr. Hokanson: Your Honor, I cannot assure the Court that there will be any proof that such a pressure was ever actually realized. I can assure the Court that there will be evidence introduced that an auxiliary pump was put into operation capable of delivering a pressure of 100 pounds.

The Court: Then have the question so conditioned.

Q. In substitution of the assumption made that the pump used actually was delivering 100 pounds, assume instead that the pump was put into operation, an auxiliary fire pump, which was capable

(Testimony of J. D. Gilmore.)

of delivering a pressure of 100 pounds: under those circumstances, in your opinion, would it be possible to cause infiltration of salt water into the lubricating oil through leaks of the size heretofore described?

A. Not if the description of where the leaks were found is correct. I may elaborate that a little bit. From what I have heard, the leaks were found——

Mr. Howard: Just a minute.

The Court: Heard where?

The Witness: From the attorney.

Mr. Howard: I object to that.

The Court: It is sustained.

Mr. Hokanson: I believe, your Honor, there is contained in this assumption the fact that the leaks were found in the seams and not in the tubes themselves.

The Court: You would have to develop that that is the fact.

Mr. Hokanson: It is in the record, your Honor.

The Court: You will have to develop that that is the fact this witness is talking about when he adds this further elaboration.

Q. Did you hear the assumptions made in my first hypothetical question? A. I did.

Q. Assuming that the leaks were found around the seams in the soldered part where the core joins the casing—— A. Yes.

Q. ——do you have something further to observe with respect to the possibility of getting water into the oil?

(Testimony of J. D. Gilmore.)

A. When the head is put on the oil ends of that heat exchanger, that particular joint is covered by a gasket so that the gasket would seal any leakage that happened to be [1320] in that seam when that heat exchanger was assembled and in operation.

Q. Assume that the facts heretofore given you in the first hypothetical question; and assume that when this vessel after two breakdowns, occurring respectively on October 26 and on November 5, 1948, in both cases of which the timing gears were galled, both upper and lower; assume further that on the first breakdown, the upper timing gears were only normally worn, the lower timing gears were worn out, irregularly and erratically worn, and on the second breakdown both upper and lower gears were worn out in an erratic fashion; and assume that after the vessel returned to Los Angeles on November 11 the engine was opened up and no damage was found to any of the main bearings or the camshaft bearings lubricated by the same oil system furnishing lubrication to the timing gears in question: could such galling of the timing gears be caused in your opinion by contaminated lube oil?

A. No.

Q. Are you acquainted with the methods of testing lubricating oil for marine diesel engines to determine the foreign matter content thereof?

A. I am.

Q. What is the method used?

A. It is sent to a laboratory and a sample of oil

(Testimony of J. D. Gilmore.)

is [1321] centrifuged to determine the amount of water and bottom sediment, and then that moisture and bottom sediment is analyzed to determine what it is, whether the water is salt or fresh and what the contents of the sediment are, whether they are sand, rust, metal shavings, or anything else.

Q. Where should the sample of oil be taken from in the marine diesel engine to get a true sample of the oil which circulates throughout the engine for lubricating purposes?

A. The oiling system should be started up and the oil circulated in the same manner that it is when the engine is operating, and then a sample should be drawn from the pipeline. Generally it should be a small sample over some period of time, so you will get a pretty fair idea of the amount of foreign matter that happens to be in the lubricating oil. If you do any other method, you are liable to get a pocket of water and get a very high percentage of water; you are liable to run into perfectly good oil and get a bad sample, but what you are interested in is the lubricating oil really going into the engine, and if you draw your sample from that you get a true picture of the condition of the oil.

Q. Would you have any opinion as to the representativeness of a sample of oil taken up from low spots in the bed of an engine? [1322]

A. That would not be a true sample. It is very, very possible that you would get an excessive amount of moisture because the water would go to the

(Testimony of J. D. Gilmore.)

lowest part and the oil would float on the top of it.

Q. If you know, can it be established what the nature of the foreign material in lubricating oil is by tasting it? A. No.

Q. Assuming the facts I have heretofore given you concerning the history of this vessel and its breakdowns and based upon your knowledge of marine diesel engines: what possible cause, in your opinion, could there be for the galling of timing gears?

A. I would look for two things: one of them was worn bearings in the shaft of the timing gears so that the helical gears could get out of their true position and there would be pinching action between the teeth to cause excessive wear. That would have shown up, possibly, if the gears had been carefully examined.

The other thing that I would look for would be an excessive strain on the shaft and pumps and other things that are driven by the timing gears, which put more strain on them than what they can carry, and they wear.

Q. Is it possible to develop such stresses or extra strains during the operation of a vessel at sea?

A. It all depends upon what is driven by the timing [1323] years. There are bearings on there that no doubt can be set too tight and possibly will be some pumps where the packing glands can be pulled up so tight as to put an excessive strain on

(Testimony of J. D. Gilmore.)

the rod. It could be some of your cams are not operating just exactly right, and put a strain on the camshaft and transfer to the timing gears which is driven by the gear on the camshaft.

The Court: I would like for counsel on both sides to know that it would be informative to the Court if upon proper questions it could be ascertained whether the circumstance of the lapse of time between change of lubricating oil and occurrence of damage throws any light upon the cause of the gear damage.

Q. Reverting back to certain assumptions, assume that the vessel leaves Puget Sound October 15 and according to its log the vessel runs in proper operating condition for a period of ten days at, let's say, an average speed of 280 revolutions; assume further that on the 10th day the lubricating oil is changed; assume further that the following day the timing gears are galled; assume further that the pressure of the coolers, fresh water and oil, on the salt water side is maintained at 7 pounds, and the oil side in the oil cooler at 18 pounds; and assume further that leaks are discovered in the coolers sometime later when they are removed from the vessel: in your opinion, could timing gear [1324] failure on the day following the change of oil have been caused by infiltration of sea water into the oil as a result of leaks in the coolers? A. No.

Q. Assume that——

Mr. Howard: Can we have the witness explain this answer?

(Testimony of J. D. Gilmore.)

The Court: I would like to hear him explain it, and in connection with the explanation, I would like him to discuss the alternative causes, if there are any disclosed by the question.

Q. Would you explain your answer?

A. It has been stated that the lubricating oil pressure was 18 pounds, and that the water pressure on the other side of the cooler was 7 pounds. If the cooler had leaked, the oil at 18 pounds would have flowed into the salt water and overboard; the salt water wouldn't have flowed from 7 pounds against 18 pounds into the engine.

Second, the cooler when assembled had the portions found leaking later on covered by a gasket, so therefore they couldn't leak. The change of oil, if it was good oil put in there, in my opinion would have nothing whatever to do with the wearing of the gears the next day. It could have been contaminated lubricating oil put in the system, but you wouldn't look for it in the timing gears. You [1325] would look for it in your main bearings, your crankshaft bearings, and particularly in your crosshead bearings where the babbitt would be cut and the pins would be scored.

Q. Assume that a breakdown was suffered off the coast of Mexico on the 26th of October, the vessel put into Manzanillo on the 28th, and two days later a representative from the engine company came down to install new timing gears; and that the representative of the company without ascer-

(Testimony of J. D. Gilmore.)

taining the condition of the oil that had been in the system when he arrived, the same having been cleaned up, and without examination of the log of the vessel, merely replaces the worn timing gears and thereafter the vessel is put to sea with new oil in it and the gears go out again in 36 hours from the time it leaves Manzanillo, what is your opinion concerning the practice adopted by the engineer in installing the new gears?

Mr. Howard: I object to that question on the ground that it does not contain the necessary assumptions which have already been testified to in this record, and on the further ground that counsel is asking this witness' opinion as to the practice, which I submit to your Honor is not a proper subject for this witness to answer without further knowledge of what the service representative did who was sent down there to Manzanillo to do this work that has been contained in the [1326] assumptions; but particularly the assumption does not contain any reference to the fact that additiona lubricating oil lines were directed to the vertical timing gear.

The Court: Sustained.

Q. Assume that in addition to the replacement of the gears the representative put a new lubricating oil line in addition to the one already existing leading to the lower vertical timing gears.

Mr. Howard: I object further, if the Court please, that there has been no assumption about the

(Testimony of J. D. Gilmore.)

effecting of the alignment of the various bearings and the shaft as has been testified to heretofore in this record as having been performed at Manzanillo.

The Court: Can you mention the details?

Mr. Howard: Yes, your Honor. Mr. Cross testified that when these gears were taken out and the vertical shaft, he removed the shaft and took it ashore and checked it in the machine shop for alignment. He also testified, as I recall, that he did check the alignment of the other gears and the camshaft on the main engine, and the bearings.

The Court: Any other details that have not been mentioned?

Mr. Hokanson: May I incorporate Mr. [1327] Howard's statement in my assumption and make one additional assumption?

The Court: You may do so.

Q. Assume further that the engineer who put in the gears and put in the additional lubricating oil line had assumed at the time that the previous galling had been caused by a stopped-up lubricating oil line leading to those gears: what is your opinion of the practice adopted by him at Manzanillo?

A. Will you explain to me what his practice was? In your previous question you spoke about installation of an additional lubricating oil line, is that what you have reference to?

Q. That is right. A. Well,——

The Court: Can you answer his question about the practice?

(Testimony of J. D. Gilmore.)

Q. Do you think that the steps taken by the service engineer conformed to proper marine practice? A. No.

Q. Why not?

A. The engine didn't run after he fixed it up, so he couldn't have made it run.

Q. What did he omit, if you have an opinion?

A. I think he omitted checking to find out what was [1328] causing the gears to wear. It appears to me that he assumed that they weren't getting sufficient oil and he put in an additional lubricating line; and it is proved that his assumption was wrong because it only run a short time, as I understand it. There was something else wrong with that engine that the service engineer didn't find.

Mr. Howard: I move to strike that part of the answer as not responsive to the question.

The Court: It may be stricken. The first part of his answer will stand.

Q. Handing you what is known as Exhibit A-20, which purports to be an analysis of the lubricating oil taken from the bed of the engine of the vessel Urania on November 11, I will ask you to read the analysis, disregarding the comment which follows the analysis, and state your opinion as to whether oil of that analysis would be adequate to properly lubricate a Diesel engine of the type in the Urania, which is a 560 horsepower, six cylinder, four cycle Union Diesel engine?

Mr. Howard: Are you referring to the oil in

(Testimony of J. D. Gilmore.)

the condition it was at the time the sample was made, or are you referring to the oil of the type described as being used on the vessel?

Q. I am referring to the oil sample used in this analysis. [1329]

A. Do you want me to quote——

Q. No, I just want to know whether you think that oil is of sufficient viscosity properly to lubricate a marine diesel engine?

A. Yes; a little high, but it is okay. It is 540 seconds at 100° Fahrenheit, that is all right.

Q. In your opinion, could oil showing that analysis be the cause of helical case-hardened steel timing gears galling within a period of 36 hours?

A. No. Water content a little high, but not too bad, 1.4 per cent.

Q. Assume further that this oil represents oil taken from the base of the engine and not out of the circulating system: What is your opinion as to what the quality of the oil in its circulating condition would be, if you know?

A. I would say this sample is useless from the place it was taken. You have considerable, .46 iron oxide in there. It is probably rust laying in the bottom of the crankcase. You wouldn't get that amount of rust in the circulating system. You wouldn't get the same amount of water in the system when it was circulating, so it seems to me that this sample—that doesn't represent at all the oil that was in use in the system.

(Testimony of J. D. Gilmore.)

Q. Assuming that the foreign matter, including the water, goes to the bottom; would a sample taken from the [1330] oil in circulation be of a better quality or of lower quality than that sample?

A. Better quality.

Q. You have heretofore stated that in your opinion lubricating oil contamination could not have been the cause of the galling of these gears if the other bearings, the main bearings and the crank bearings, were not affected. Would you state why you gave that opinion?

A. The wearing parts of a Diesel engine are lubricated under a forced feed system. The oil is put through the main bearing under pressure, lubricates the bearing and into the hollow crankshaft, runs along to the crank pin, the hole in the crank pin bearing; the oil comes out, lubricates that bearing, goes up through a hole in the connecting rod and lubricates the crosshead bearings at the top, and in an engine with a slipper the oil goes from the crosshead bearings into a hole and lubricates the slipper.

The crosshead bearings and all the other bearings are babbitt lined. The crosshead bearings are furtherest from the pump, the one that is subjected to least pressure. In my experience over quite a number of Diesel engines, if you have contaminated lubricating oil with water, if you have a loss of oil pressure, your cross head bearings and crank pin bearings are the first ones that cause you trouble.

(Testimony of J. D. Gilmore.)

Mr. Howard: I object to the last part of that because [1331] there is no assumption in this record there has been any loss of pressure. I move that part of the answer be stricken on that ground.

Mr. Hokanson: That is a part of his answer, your Honor, in giving his explanation for arriving at the conclusion that he gave.

Mr. Howard: It is not responsive to the question because it assumes a fact that is not a matter of record.

The Court: If your answer is based upon that, if there is a low pressure, it will have to be stricken. Is your answer predicated upon that basis?

The Witness: My answer is predicated upon damage to bearings of a Diesel engine through trouble with lubrication, either contamination with water or lack of pressure.

Mr. Howard: I renew my objection, your Honor.

The Court: It will have to be stricken, because Court cannot tell that he meant then or means now to make the answer irrespective of that condition, and that condition I do not recall being presented here.

Q. Irrespective of the assumption of the lack of pressure, do you have anything further to add to your answer?

The Court: I think you had better resubmit the question. You will have to submit a question with the express exclusion of that condition. [1332]

Mr. Hokanson: May I ask that the answer be

(Testimony of J. D. Gilmore.)

read back?

Mr. Howard: I object to that part of the answer which has been stricken being read back.

The Court: Leave out that assumption and do not consider diminishing pressure.

Q. Would your answer be changed, Mr. Gilmore, if you eliminated——

The Court: Ask him to state his answer.

Q. Would you state your answer again, eliminating from it any assumption of a drop in pressure?

A. It is my opinion from experience that where you have difficulty with lubricating oil, we will say through contamination, that the bearings, particularly the crank bearings and crosshead bearings, are the first ones that suffer damage.

Q. Why?

A. The crank pin bearing, particularly, is under quite a heavy pressure per square inch. On top of that, it is revolving quite rapidly and you have a certain wiping action of your crank pin going around on your bearing. The speed is quite a number of feet per minute, and that causes a lack of oil there; and the crank pin bearing is the one that generally gives you the trouble, contamination or other causes through your lubricating oil. [1333]

Q. Have you had any experience in examining logs of seagoing vessels? A. About 32 years.

Q. Do you know what accepted marine practice is with respect to the keeping of an engine log?

(Testimony of J. D. Gilmore.)

A. The main temperatures——

Mr. Howard: That calls for a yes or no answer.

The Court: I think so.

A. Yes.

Q. Handing you the engineroom log, Exhibit A-12, have you ever examined those logs before?

A. I did.

Q. When?

A. It was about ten days ago.

Q. Where?

A. In the third floor office of the clerk of the court.

Q. Would you turn to the log entries commencing on October 16, 1948, and examine them through the period ending November 6, 1948, and state your opinion as to the competency of the engineer making the entries?

Mr. Howard: I object to that question. The competency of the engineer making the entries in the log cannot be determined, I submit to the Court, by an examination of the log itself. You have to see the engineer perform the duty to state what the competency [1334] of the engineer is.

Mr. Hokanson: May I respond?

The Court: You may.

Mr. Hokanson: In a case in 1939 American Maritime Cases, p. 281, Mr. Augustus Hand had this very problem to deal with, and the upshot of his opinion was that logbook entries reflected either credit or discredit upon the testimony of the wit-

(Testimony of J. D. Gilmore.)

nesses relying upon them together with the people who had made the entries in the log.

The Court: It seems to me you should ask him about some characteristic as reflected by the nature and quality of the entries.

Q. Are there any entries there showing the temperatures going in and out of the lubricating oil cooler, covering that period?

A. On October 16, under "lubricating oil", on the 8 p.m. watch, it shows 100° into the cooler and 125° out of the cooler; and the 4 a.m. watch shows 100° into the cooler and 125° out of the cooler.

Q. Do you have any observation to make about that entry?

The Court: As to what?

Q. As to whether it is a correct entry?

Mr. Howard: How could this witness know, if the Court please, whether it is a correct entry or not [1335] if he wasn't aboard the ship at the time?

The Witness: May I state that this——

The Court: The objection is overruled. You may ask him whether he knows anything about the accuracy of that entry, or something to develop knowledge.

Q. Would that be an accurate entry, if you know?

Mr. Howard: I renew my objection. I submit this witness has not testified that he was aboard the ship at the time the entry was made.

The Court: I do not sustain the objection on

(Testimony of J. D. Gilmore.)

that ground. I think the witness should be shown to have some idea as to whether that could be a correct entry.

Q. Could that be a correct entry? A. No.

Q. Why not?

A. I imagine that this being the smooth log made out by the chief engineer, that he has got his figures reversed.

Q. Why should they be reversed?

A. Because if you have a lubricating oil cooler supposed to cool oil, you can't put it in at 100° and take it out at 125°. You are heating it up 25° in place of cooling it.

Q. Would you look at the log entry on the same watch showing temperature of the lubricating oil at that time? Is it given there? [1336]

A. There is no entry.

Mr. Howard: What time were you referring to?

Mr. Hokanson: The same watch as he has referred to on October 16.

Mr. Howard: And you asked him whether there was an entry as to the temperature of the lubricating oil?

Mr. Hokanson: That is right.

The Witness: There is two entries.

Q. What do they show?

A. 100°; 125° out. There is no entry under thrust, there is no entry under main bearing.

Mr. Howard: I move to strike the last part of the answer as not responsive.

(Testimony of J. D. Gilmore.)

The Court: The last part of the answer is stricken.

Q. Would you now examine the entries covering the period stated?

The Court: You are giving quite a lot of time to this. The Court has in mind that it has been testified that this engineer had a limited speaking knowledge of English. My understanding of the testimony was in effect that he may have been able to understand to some extent the English language and converse with persons who spoke English, but that his speaking knowledge of English was limited. In view of that circumstance, it seems to me almost anyone might suppose one unfamiliar with the language might get the figures reversed.

Q. Are there any more entries under the lubricating oil cooler? A. Not under the cooler.

Q. During that period?

A. This logbook finishes up October 28. How much further do you want to go?

Q. Let's stop there. Are there any entries after October 16 on that particular point? A. No.

Q. Is it standard practice to make those entries?

Mr. Howard: Objected to as leading.

The Court: Overruled.

A. Yes, it is very important for the shore officials in checking over condition and performance of an engine from the logbooks that they have all these entries in so they can see what has happened during the voyage.

(Testimony of J. D. Gilmore.)

Q. What does the log show covering the period mentioned in the exhaust temperatures of the cylinders?

A. October 16, there is only two entries, on the 12 midnight and 4 a.m. in the morning, and the run between 550 to 660°. Just checking the cylinders, they run about the same: No. 1, 550; No. 2, 600; No. 3, 650; No. 4, 600; No. 5, 580; No. 6, 540.

Q. Have you examined those exhaust temperatures daily [1338] down through this period?

A. I am doing it now. They are about the same, although on October 19 the No. 1 cylinder dropped down to 510° temperature, for some reason or other.

Mr. Howard: Wasn't it 510 all the way through, Mr. Gilmore?

The Witness: No, it was 550 on October 16.

Q. From the examination of those exhaust temperatures, do you have any opinion as to how the engine was running if those entries are accurate?

A. It seems as though the fuel was not balanced up amongst the six cylinders.

Q. Why not?

A. Well, they should be within 40 or 50°, possibly, with correct adjustment of the fuel valves so that you get the same power from each cylinder. No. 1 here seems to be a little logy; No. 5 is down some, but not too much.

Q. What about the r.p.m. entries covering this period?

(Testimony of J. D. Gilmore.)

Mr. Howard: I object to that question asked the witness, "What about the r.p.m. entries?" I think counsel should be required to ask the witness a specific question about the r.p.m entries.

Q. Have you studied them? A. I have.

Q. And what do they reflect? [1339]

The Court: As to what?

Q. What do they reflect with respect to the operation of the engine?

A. They reflect that the entries are incorrect because they run exactly 290 revolutions per minute for watch after watch, and then they jump up to 300 for watch after watch after watch; then go back to 290 for watch after watch, 290, 290, 290; and then they drop to 288 and everybody puts down 288 for a full day; then they go back to 290 for a full day; so I think that they are incorrect, very much so.

Q. Why?

A. Because it can't run that regular; it is impossible to run an engine within one revolution for days after days after days. It isn't done; it can't be done; yet can't regulate them that close.

Q. Turning back for a moment, what does it show during this period with respect to the lubricating oil pressure?

A. The lubricating oil pressure on October 16 is 18, and 18, 18, 18, 18 pounds right along, no change up and down, 18 pounds exact all the way.

Q. Is that possible? A. No.

(Testimony of J. D. Gilmore.)

The Court: What are some of the influences that make it impossible?

The Witness: Temperature of your oil, temperature [1340] of the sea water, revolutions per minute of the engine, all have an effect on that. They vary only maybe one or two or three pounds, but that variation is something that should be noted.

Q. You looked this log over before, have you not? A. Yes.

Q. Do you have any opinion as to the reliability of the entries therein?

A. Not a bit. This is the smooth log made up by the chief engineer.

The Court: I wonder if this answer was responsive.

Q. I asked if you had an opinion?

A. Yes.

Q. Would you state what it is?

A. The opinion is that this is a smooth log made up by the chief engineer, and I don't know from this how the watch engineers kept their log, whether they showed actual conditions, actual variations or not, but the chief engineer seemed to put in the figures here that do not mean very much. They are too even to be true.

Q. Are there any omissions which should be in the log?

A. Yes. The lubricating oil temperature in and out is omitted some places; his bearing temperature is omitted; the thrust temperature is omitted; his

(Testimony of J. D. Gilmore.)

lubricating oil consumption is omitted; the fuel oil consumed——no, that [1341] is different.

Q. In your experience, if you know, what is the practice in shipyards and in maritime affairs with respect to the responsibility of the shipyard for damages resulting from main engine breakdown where the work was done in the shipyard but under the direction of the chief engineer, the shipyard merely furnishing machinists along with members of the crew for the repair work?

Mr. Howard: I am going to object to that question on the basis of the Court's previous ruling when I on behalf of the claimant and cross libelant undertook to inquire of a witness in the case on the libel as to a practice in a shipyard. At that time the Court sustained objections by counsel for libelants to such questions to the witness.

I submit that the same ruling should prevail on the question that has been propounded by counsel asking this witness to testify as to what a practice is with respect to the shipyard and the damage that may be sustained.

Mr. Hokanson: I don't believe the situations are analogous. I can't recall on what grounds Your Honor sustained my objection to Mr. Howard's questions. The Court has heretofore received evidence on this.

The ourt: Upon whose questioning?

Mr. Hokanson: Upon my questioning, Your Honor. I [1342] asked Mr. Williams this very

(Testimony of J. D. Gilmore.)

question, and his testimony is recorded. I have it here; I can read the question and the answer he gave, to refresh Your Honor's memory.

The Court: Do you seek to elicit by this question different information from that given by Mr. Williams?

Mr. Hokanson: No, if Your Honor is satisfied with the testimony already given.

The Court: I will sustain the objection.

Mr. Hokanson: You may examine.

Cross-Examination

By Mr. Howard:

Q. By whom were you engaged to attend the Urania? A. When?

Q. On the date that you mentioned, the month of October, 1948.

A. Mr. Black, Commercial Ship Repair.

Q. And do you have a record of when you were aboard the vessel? Will you refer to your notes and tell us when you were aboard?

A. October 15, 1945.

Q. Were you aboard on any later date?

A. No.

Q. Just the one date? A. Right. [1343]

Q. Previously you had been aboard the vessel for some other purpose? A. Yes.

Q. Representing whom?

A. Bureau Veritas, that is the French Naval Classification Society, which is the same as the American Bureau.

(Testimony of J. D. Gilmore.)

Q. When was that, please?

A. That I haven't got in my notes here, but I think that was sometime in August.

Q. Of 1948? A. Yes.

Q. What was the purpose of your going aboard for Bureau Veritas at that time?

A. Mr. Williams had a wire from the owners that they requested that a certificate be obtained of the measurements of the vessel increasing her net tonnage over 500 tons. We were called over to examine the vessel and check her over and see if it were possible. It was impossible. We gave them a certificate to increase the net tonnage of the vessel, but not over 500 tons; submitted a bill to the General Steamship Company and I believe we were paid.

Q. Do you know how this vessel is classed?

A. American Bureau.

Q. Do you know how long it has been classed in the American Bureau? [1344]

A. At this time, as I understand it, she was billed under Navy regulations and was not classed at that time.

Q. Were you on the vessel on any occasion subsequent to October 15, 1948? A. No.

Q. Did you attend the vessel at Los Angeles on any occasion after that?

A. No. I would have been glad to, but was not notified.

Q. Mr. Gilmore, have you seen Exhibits A-21,

(Testimony of J. D. Gilmore.)

A-22 and A-23 before, or copies of them?

A. Yes, I have seen these.

Q. All three of them? A. Yes.

Q. Do you know any of these gentlemen: Mr. Pike, Mr. Dupuy, Mr. Summers?

A. I don't know Mr. Pike. I have met Mr. Dupuy, and I know Mr. Summers.

Q. Have you noted the conclusions they have reached in those survey reports with respect to the breakdown of the main engine and the parts that were damaged and the cause of the damage?

A. I have got Mr. Dupuy's here.

Q. Have you noted whatever conclusions or findings there are on each of the three reports? [1345]

A. The American Bureau——

Q. Can you answer me yes or no? Is that possible, Mr. Gilmore?

A. Yes, I have examined them.

Q. Do you or do you not agree with the conclusions and the findings that have been reached by those surveyors?

A. I do not agree with them.

Q. If you have a sample of fluid removed from the bottom of the crankcase of an engine and put in a pail or bucket in sufficient quantity that the substances, the fluids, will separate oil from water, let's say; if you taste the one substance that appears to be water, would you be able to tell whether that was salt water or not?

(Testimony of J. D. Gilmore.)

A. I presume that you would; I have never done it. I presume that you would be able to do that.

Q. The answer that you made then as far as the taste test not being adequate was not directed to such a test as I have just described?

A. No, no.

Q. When it comes to testing a lubricating oil cooler—and I believe you stated that as a matter of experience you would recommend one and a half times the operating pressures—— A. Yes.

Q. ——isn't it a fact that manufacturers usually [1346] specify the test pressures?

A. Sometimes they do and sometimes they don't. If they are building anything for the Navy, they must specify the test pressures. If they are building something commercially, they don't have to specify test pressures.

Q. Isn't it a fact that a test pressure is entirely different from an operating pressure?

A. Yes, test pressure is generally a little higher.

Q. Did you note the condition of the lubricating oil cooler when you were aboard the Tanker Urania on October 15? A. No.

Q. Did you notice whether there was any test plate on it showing the test pressure on the salt water side of the lubricating oil cooler?

A. No, I did not.

Q. Would your opinion as to the proper test pressure be different if you assume the fact that there is a stamped plate on the lubricating oil cooler

(Testimony of J. D. Gilmore.)

showing a test pressure on the salt water side of 300 pounds per square inch?

A. Yes. I wouldn't put that pressure on that cooler the way it was put on.

Q. You wouldn't put it the way it was put on by Mr. Oakland?

A. No, I wouldn't put it on the way it was put on by Mr. Oakland.

Q. How would you put it on? [1347]

A. I would put it on when the head was on and the gasket was on to hold the interior part of that in place, in place of putting an excessive pressure on and only depending upon a soldered joint to hold it in place, on account of the construction of that cooler.

Q. I am afraid I didn't follow your answer. Could you amplify it for me?

A. That cooler has got a box and a core that goes in. The core goes down; it is soldered all around the edge and there is a cover put on there. There is a gasket under the cover and the gasket covers the joint and stiffens up that plate. You can put the pressure on—you have got the stiffness of the head and the gasket to hold that plate of the cooler in place.

You take that plate off and you put a pressure on the inside, and you can blow that right out because all you have got holding that in place is a soldered joint.

Q. If I understand you correctly, if you assume

(Testimony of J. D. Gilmore.)

that there is a stamped plate on the cover of the cooler showing a test pressure on the salt water side of 300 pounds per square inch, that you would not have tested it the way Mr. Oakland did?

A. No, I didn't say that. I said I wouldn't have tested it to 300 pounds the way Mr. Oakland tested it, because he had it apart. [1348]

Q. Assuming that there was such a test plate, how much pressure would you apply on the salt water side?

A. 18 pounds is the top pressure that that cooler operates under. It doesn't make any difference whether it is the salt water side or oil side, you still have 18 pounds as your top pressure on the cooler, and one and a half times, a little bit more—in common practice, 50 pounds is a nice pressure to put on and it doesn't strain anything. It will show the leaks. One and a half; according to the rules, not less than 15 pounds.

Q. What rules are you speaking of?

A. The American Bureau.

Q. Such a pressure might not be sufficient to develop leaks if the cooler hadn't been properly cleaned first before testing, isn't that a fact?

A. No.

Q. Why not?

A. Well, if you got dirt in there and it stops your leaks, it is just as well as anything else. You might just as well leave it there.

Q. Isn't it a fact that if you had salt or other

(Testimony of J. D. Gilmore.)

foreign material imbedded in your tubes or around the tubing or sheets, that it would not show leaks if the cooler had not been properly cleaned before 50 pounds, or one and a half times the operating pressure, was applied on a test? [1349]

A. If you had any dirt left in there, it would seal the leaks, that is correct. If it wasn't properly cleaned and there were openings, we will say, and they were sealed with dirt, they wouldn't leak.

Q. Let's look at this question of the galling of the gears. As I understand it, you expressed the opinion that the galling could not be caused by contaminated lube oil? A. That is right.

Q. Are you assuming, in rendering that opinion, that there was contamination of the lube oil?

A. No, I am not assuming that there was contamination of the lubricating oil.

Q. Assume that there was contamination of the lube oil: then what would be your opinion as to the possible causes of the galling of these vertical timing gears in the main engine of the vessel, bearing in mind, if you please, the other assumptions that counsel has heretofore stated in examining you?

A. Assuming contamination of the lubricating oil—we don't know what percentage of contamination there is, but it is my opinion that the bearings in the engine would fail long before the gears would fail through any contamination of lubricating oil.

Q. When you speak of a bearing, you are speak-

(Testimony of J. D. Gilmore.)

ing of a broad surface, are you not, the contact between two broad [1350] surfaces? A. Yes.

Q. And speaking of gears, do you have the same contact?

A. In a spiral gear, you have a certain wiping contact.

Q. How about in a helical gear?

A. You have it in a helical gear.

Q. What would you say as to the relative protection of a lubricating oil film that you would get between a bearing surface and a helical gear surface?

A. I didn't get you. Will you ask that question again, please?

Q. Will you read the question, please?

(Last question read by reporter.)

A. If your oil would adhere to your gears, you would have just as much protection as you would have the oil adhering to your shafting.

Q. Isn't it a fact that your protective oil film would break down faster on a helical gear than it would on a bearing?

A. You possibly have got more pressure per square inch on your gears than what you have on your bearings; but on your bearings you have a hard steel surface against a soft babbitt surface, and on your helical gears you have two hardened steel surfaces coming together which will stand considerable more pressure per square inch than what your [1351] babbitted surfaces would stand.

(Testimony of J. D. Gilmore.)

Q. This sample that has been referred to, that we assume was taken from a low spot of the engine; if the salt water in the lubricating oil was in that crankshaft, it would show up in a sample taken from a low spot of the engine bed, would it not?

A. Yes. I am surprised that the water is not given on this analysis.

Q. You say you never saw the lubricating oil cooler opened up on the Tanker Urania?

A. No.

Q. How do you know that that gasket covers the——

A. That is the standard design of a Harrison cooler or heat exchanger.

Q. And you are positive that the gasket does cover the soldered joint?

A. The gasket covers that soldered joint.

Q. Do you know what material the core of the Harrison cooler is made of?

A. No, but I imagine it is one of the cupronickels.

Q. You have expressed an opinion as to the sufficiency of the entries made in the engineer's log. Will you state from your experience whether it is the practice to maintain full and complete entries of the items and types described on a small vessel?

A. It should be.

Q. Do they do it on fishing boats?

A. No.

Q. Do they do it on ferry boats? A. No.

(Testimony of J. D. Gilmore.)

Q. Do they do it on tugs? A. No.

Q. How large is the Tanker Urania?

A. She is something under 500 net tons, 364 net; 500 and something gross; 560 horsepower engine.

Q. Then the practice you had reference to is a practice maintained on larger vessels, isn't that correct? A. Yes.

Q. And wouldn't necessarily apply to a vessel the size of the Urania? A. It should.

Q. But as a matter of experience, it doesn't apply, does it?

A. The Urania is a little bit different type of a vessel than a tug or a ferry boat or fishing vessel. She is a tanker, she carries, I understand, a chief and three watch engineers, so that for the chief engineer to actually know what occurs during the time that he is asleep, he must have log entries so that he can know what is going on in the engineroom when he is not there. [1353]

Q. What is the horsepower of the main engine on the Urania? A. 500 horsepower.

Q. Can you strike any average of the horsepower of the Diesel tugs operating between here and Alaska?

A. I can give you an illustration.

Q. Can you answer the question?

A. With tugs?

Q. Yes, the tugs operating between Puget Sound and Alaska.

(Testimony of J. D. Gilmore.)

A. They have got more horsepower, they have got 1200.

Q. You are referring to the miki-miki type?

A. The miki-miki type, yes.

Q. Those have 1200 or 1290 horsepower Fairbanks Morse Diesel engines in them, don't they?

A. Yes.

Q. Yet you say it is not a practice on tugs to keep full entries in the engine room log?

A. No.

Mr. Howard: No further questions.

Mr. Hokanson: I have no questions.

The Court: You may be excused.

(Witness excused.)

The Court: Further proceedings in this case are continued until Saturday morning at 9:30. Those connected [1354] with this case are excused until that time.

(At 5:15 o'clock p.m., Thursday, April 14, 1949, proceedings adjourned until 9:30 o'clock a.m., Saturday, April 16, 1949.)

April 16, 1949, 9:30 o'clock a.m.

OLE LILLEHEI

recalled as a witness by and on behalf of libelant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. You were the superintendent at Winslow during the repairs to the Urania?

A. Yes, sir.

Q. Do you recall the ship and its details of construction? A. Sir? [1355]

Q. Do you recall the Urania? A. Yes, sir.

Q. Did you ever see the day tanks on the Urania which contained the lubricating oil?

A. Yes, sir.

Q. Do you remember the size of the day tanks?

A. I would say they were about 24 by about 36.

Q. Do you know what capacity in terms of gallons a tank of that size would have?

A. I would say 75 or 80 gallons.

Q. What is the day tank?

A. The day tank is a—you would call it a reservoir where—well, if the engine is running, there is some pump which moves the oil from the base of the engine to the day tank and the lube oil pump takes the suction from the day tank and puts it throughout the lubricating system of the engine.

(Testimony of Ole Lillehei.)

The Court: That is what happens with respect to it, but what do you call it? Can you give it a name that reflects the function it performs in the power generating system?

The Witness: Your Honor, that would come under the lubricating oil system.

The Court: The day tanks are part of the lubricating oil system? [1356]

The Witness: Yes, sir.

The Court: Can you give them a name that reflects the function they perform?

The Witness: A day tank holds the amount of oil that you need to maintain the lubricating oil—to provide sufficient lubrication for that engine.

Q. It is a storage or reservoir tank for the lube oil? A. Sir?

Q. It is a storage or reservoir tank for the lube oil, is that right?

A. It is—well, it would be storage or a reservoir, you could call it either one.

Q. Do you remember whether there was more than one day tank on the Urania?

A. No, I don't.

Q. Did you see the Clayton boiler on the Urania?

A. Yes, sir.

Q. Did you ever see it in operation?

A. Yes, sir.

Q. Did you ever see the pump in operation?

A. Yes, sir.

(Testimony of Ole Lillehei.)

Q. When did you last see it in operation, if you remember?

A. The last time I saw it in operation was with Mr. Clarke, when he was over there on his survey.

Q. And do you remember when that was?

A. It was sometime in October, the first part of October.

Q. And was the pump then operating?

A. Yes, sir.

Q. Do you remember whether anyone else was present when you and Mr. Clarke witnessed the operation of the Clayton boiler?

A. I believe there was one pipe fitter and Mr. Clarke and myself. Of course, the ship's crew was there.

Mr. Hokanson: You may examine.

Mr. Howard: I have no questions.

The Court: Does an automobile have a part which corresponds to the day tank?

The Witness: No, Your Honor. An automobile —the reservoir for the oil is contained within the base of the engine, which takes its suction right from there.

The Court: What do you call it?

The Witness: The base of the engine.

The Court: The base of the engine acts as the day tank, reserving a sufficient quantity of lube oil to lubricate the engine?

The Witness: Yes, Your Honor.

The Court: Do the day tanks in connection with

(Testimony of Ole Lillehei.)

the engine on the Urania serve a similar purpose respecting [1358] that engine?

The Witness: That is right, Your Honor.

The Court: What function does the Clayton boiler serve on this ship, the Urania?

The Witness: The Clayton boiler, Your Honor, provides your heating system for your various parts of the ship, the rooms and mess rooms.

The Court: Provides steam heat, or some other kind?

The Witness: Yes, sir, steam heat.

The Court: Provides steam heat for what?

The Witness: For heating the vessel.

The Court: For heating the living quarters or anything else?

The Witness: The living quarters, correct.

The Court: And what else?

The Witness: And it also provides steam through the heating coils in the cargo tanks.

The Court: Is there anything else that is done by the Clayton boiler?

The Witness: I think, Your Honor, that it would be covered—I don't know whether I should mention this or not, but it has—on that Urania, you had the connection going to a hot water tank which heated it just as though it were your hot water tank at home, heated the hot water in this hot water tank for domestic [1359] use right in the galley, and so no.

(Testimony of Ole Lillehei.)

The Court: For heating water for personal use?

The Witness: Yes, for domestic use and showers, and so on.

The Court: What, if anything, did you do with reference to the day tanks and the Clayton boiler while the vessel was at the repair yard of the libelants at Winslow?

The Witness: That, Your Honor, I don't remember because I was all over the yard and I didn't take—I couldn't see all those things.

The Court: You don't know whether the work contracted was done on those parts or not, is that correct?

The Witness: I don't remember whether we had a job on it, to do anything to the day tanks.

Q. (By Mr. Hokanson): Are the day tanks part of the main engine? A. No, sir.

Mr. Hokanson: No further questions.

Mr. Howard: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Hokanson: Mr. Short. [1360]

LESTER C. SHORT

called as a witness by and on behalf of libelants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please.

A. Lester C. Short.

Q. Where do you live?

A. Seattle, Washington.

Q. What is your occupation?

A. Electrician.

Q. Where do you work?

A. Commercial Ship Repair, Seattle Division.

Q. What is your capacity there?

A. I am the general electrical foreman of the Seattle Division.

Q. What has your experience been as an electrician? A. Would you like that in detail?

Q. Just tell us generally what your experience has been.

A. I have served as electrician for the Pontiac Motor Company, Pontiac, Michigan; as electrician and chief electrician for Wheaton College, Wheaton, Illinois; and as electrician, leading man electrician and assistant foreman [1361] electrician for the Todd Pacific Shipyards, Seattle; and as lead man

(Testimony of Lester C. Short.)

electrician and foreman electrician for Commercial Ship Repair, Seattle.

Q. How many years experience does that cover?

A. My experience started in the year 1929 for the Pontiac Motor Company.

Q. What was your training or background in electrical work?

A. My earliest training in electrical work was at Coyne Electrical School, Chicago, Illinois; and then my actual apprenticeship was served at the Pontiac Motor Company, Pontiac, Michigan; and I have a B.S. degree from Wheaton College, Wheaton, Illinois.

Q. Have you ever taught electrical subjects?

A. I have.

Q. Where and when?

A. In the in-plant training program at the Todd Pacific Shipyards for approximately two years during the war, and then at the Edison Vocational School here in Seattle for approximately two years.

Q. Were you working for Commercial Ship Repair during the months of August, September and October, 1948? A. Yes.

Q. And did you have occasion on or about October 16 to go to Port Angeles, Washington, to attend the vessel Urania? [1362] A. I did.

Q. At whose request did you go to Port Angeles?

A. By the direct request of Mr. Black.

Q. What was the purpose of your visit?

A. I was sent up there to assist the ship because

(Testimony of Lester C. Short.)

they were having difficulty with their electrical steering system.

Q. When you arrived aboard the ship, what did you do with respect to the steering system, if anything?

A. The first thing I did was ask the ship to put the system in operation so that I could observe accurately just what the difficulty was, and I found that the steering system was what we term "hunting."

Q. You mean oscillating back and forth?

A. That is right.

Q. What did you do then?

A. I had the proper tools and instruments along for making a complete checkover of the electrical system involved in the steering, and after having observed the hunting or oscillating condition of the steering, we shut the plant down and made our usual checks for electrical systems, which includes checking the condition of the insulation, checking what we call continuity of the wires—which means whether anything is broken in the circuit—and after having determined that the system was intact electrically; upon [1363] close observation I found that the difficulty in the system was in the adjustment of the hydraulic cam on the telemotor control unit.

The Court: You found the trouble was where?

The Witness: In the electrical cam of the hydraulic control unit.

The Court: The electrical cam unit of what?

(Testimony of Lester C. Short.)

The Witness: Of the telemotor control.

Q. Where is the electrical unit located in reference to the vessel?

A. In what we call the steering engineroom, which is in the after part of the vessel.

Q. Is that part enclosed in any way?

A. Yes, it is. The switches are rather delicate and they must be kept enclosed to protect them from dirt and also from mechanical injury.

Q. When you arrived aboard and began your check, was the steering engine closed up?

A. No. The cover had been removed from the telemotor control unit.

Q. Could you describe in a very simple way the type of adjustment that you made and what effect that would have upon the system? A. Yes.

Q. Would you do so? [1364]

A. In the telemotor control unit we have two sets of moving parts. One moving part is controlled by hydraulic action from the steering wheel in the pilothouse through the action of the hydraulic fluid. The other moving part is moved directly by the rudder of the ship, and unless these two parts are in their proper mechanical relationship, the system will not function properly; and so what I accomplished there was to adjust these parts mechanically so that they were in the right relationship.

Q. How was that adjustment effected?

A. By—the actual physical operation of the adjustment?

(Testimony of Lester C. Short.)

Q. Yes.

A. By loosening two nuts on the cam arrangement. One is what we call a jam nut, which is just to keep the system from getting out of adjustment, and the other is a nut that actually permits the movement of the switches to be changed.

Q. Was there any defect in the adjustment that you refer to which would occasion those becoming out of adjustment? A. No.

Q. Is the control system of which you speak subject to becoming maladjusted in normal operation, if you know?

A. As far as I know, it would not be.

The Court: There is something right there that is [1365] important to the Court that is not being inquired about. That is what caused the maladjustment, if he knows what caused it. Did he try to ascertain it; if so, did he find out? Proper questions to bring out that information would be appropriate in this connection.

Mr. Hokanson: Yes, Your Honor.

Q. Mr. Short, after effecting the adjustment referred to, did you have any conclusion as to what had caused the system to hunt?

The Court: May I interrupt you? Mr. Short, did you ascertain what caused the maladjustment of those two functions, the hydraulic function and the manual function, of the parts which were maladjusted? Did you ascertain what caused that maladjustment?

The Witness: Your Honor, that would be diffi-

(Testimony of Lester C. Short.)

cult to ascertain.

The Court: It is not a question of how hard it was to ascertain it. Did you or did you not?

The Witness: That question can't be answered by yes or no. Would you like——

The Court: Proceed.

Q. Is there any part of this system apart from the electrical steering engine system which you worked on which would have any bearing upon the adjustment that you have referred to? [1366]

A. Yes.

Q. What other part?

A. If there were air in the system, that would cause a maladjustment of the system.

The Court: Did you find air in the system?

The Witness: No.

Q. Did you look for air as part of your duties aboard the ship? A. We did.

Q. After you had completed your work, did you test the system? A. We did.

Q. Did it operate satisfactorily?

A. It did.

Q. How long did you test it?

A. Of course, that is so long ago I couldn't say with absolute certainty, but I know it was at least half an hour.

Q. Some reference has been made in testimony earlier to finding of the broken wire down in the electric steering system. Did you find a broken

(Testimony of Lester C. Short.)

wire? A. I would like to explain that, if I may.

Q. Go right ahead.

Mr. Howard: I think he should answer that question yes or no, and then go ahead.

The Court: The Court so rules. Answer the question [1367] yes or no, and then if it needs explanation you will be permitted to give it.

A. During the course of my work there, I did find a broken wire.

Q. Do you have anything further to say about that wire? A. I do.

Q. State it, please.

Mr. Howard: I think the witness should be asked a question about it and not just——

Mr. Hokanson: I will withdraw the question.

Q. Where was the broken wire?

A. It was a flexible wire between the stationary part of the assembly going to the switch—which I stated earlier, of course, moves up and down.

Q. How big is that wire?

A. I can't say exactly, but I would estimate that it is an eighth of an inch in diameter, including insulation.

Q. When did you discover it to be broken?

A. When I was through completing my adjustment of the switches.

Q. Did you notice it when you first began your adjustment?

A. No, because it was not broken then.

(Testimony of Lester C. Short.)

Q. When did it become broken?

A. During the course of adjusting the switches. As I [1368] stated, the wire is very fine and flexible and at that time the wire was knocked off of its contact.

The Court: Did that occur while you were at Port Angeles?

The Witness: Yes, Your Honor.

Q. What instruments or tools did you use in effecting the adjustment that you have earlier discussed?

A. The adjustments themselves, the mechanical adjustments, require the use of two crescent wrenches.

Q. Do you know whether anyone had worked on the system prior to your arrival?

The Court: Answer yes or no.

A. No.

The Court: Did you talk with the master or chief engineer regarding the condition you found, or how it happened to be in that condition?

The Witness: In the limited way that we could, Your Honor. I wasn't well acquainted with these people, and as you understand, our method of communication was limited.

Q. What did you discuss with the master of the vessel, if you discussed anything with him at Port Angeles?

A. I just asked him what their difficulty was.

Q. Did you have any discussion after the sys-

(Testimony of Lester C. Short.)

tem had been proved in good working order? [1369]

The Court: Where?

Q. At Port Angeles? A. Yes, I did.

Q. What did you discuss with him?

A. He inquired as to the use of what we call the hand control of the steering.

Q. What did you say?

A. I explained its function and how to use it.

Q. Did you demonstrate how it was used?

A. We certainly did.

Q. For how long a period?

A. Oh, at least 15 or 20 minutes.

The Court: How would that help the Court to tell what caused this damage? I do not see how that question and answer could help the Court determine that question. If you could bring out from this witness any knowledge or information he may have as to the cause of this damage, the Court would welcome that information at this time.

Q. Was there anyone present when you worked on the switch that you said was broken during the course of your repairs? A. Yes.

Q. Who?

A. As near as I can recall, the chief engineer himself [1370] was there, and also the mate.

Q. Are you acquainted with the details of the telemotor system on the Urania? A. I am.

Q. Do you have any opinion as to the cause of the hunting of that system as you found it when you arrived at Port Angeles? A. Yes.

(Testimony of Lester C. Short.)

Q. What is that opinion?

A. It looked to me as though the system had been tampered with.

Q. What part of the system?

A. The part enclosed by the cover, that I told you had been removed when I arrived in the engine room.

Q. You mean the part that you worked on?

A. That is correct.

The Court: The cam unit, in other words?

The Witness: Yes, Your Honor.

The Court: Which was enclosed in an enclosure?

The Witness: Yes, Your Honor.

Q. But that enclosure was removed when you arrived on board? A. Yes.

Mr. Hokanson: No further questions. [1371]

Cross-Examination

By Mr. Howard:

Q. Who was the manufacturer of this telemotor steering system?

A. The Webster-Brinkley Company of Seattle.

Q. Have you worked on telemotor system manufactured by that company before?

A. I couldn't say. I have worked on many telemotor system during the course of my experience in the shipyard. I believe I have.

Q. Were you acquainted with the wiring system, the hookup for this particular telemotor that was installed on the Urania? A. Yes.

(Testimony of Lester C. Short.)

Q. Had you done any work on the steering system in the shipyard? A. No.

Q. Do you know what work was done on the motor in the Commercial Ship Repair yard of your own personal knowledge? A. No.

Q. Do you know whether the steering motor that you have referred to in the steering engine room had been opened up in the shipyard, of your own personal knowledge?

A. As I stated earlier, I am the foreman of the Seattle Division, and the supervisor at Winslow explained to me that [1372] that had been accomplished.

Q. I asked you if you knew of your own personal knowledge? A. No.

Q. Was Mr. James Clarke, a marine surveyor, present when you made these adjustments on the telemotor engine at Port Angeles?

A. I couldn't say, because as you would understand, it requires people in the pilothouse and also the steering engine room. Part of the time he was in communication with us from the pilothouse by telephone. I don't know if he was present at this time or not.

Q. Was he down in the steering engine room at any time while the ship was in Port Angeles?

A. Yes.

Q. Do you recall having pointed out to him this broken wire in the steering engine motor?

A. No, I don't.

(Testimony of Lester C. Short.)

Q. You don't recall having pointed that out to him? A. No.

Q. Do you recall having reported to Mr. Clarke, this marine surveyor, that this broken wire was what caused the rudder or the steering system to hunt or oscillate?

A. No, I wouldn't have reported that, because that wire could not have caused the hunting and oscillating condition.

Q. I believe you said that you couldn't tell whether [1373] anyone had worked on this wire or not before you arrived aboard the ship?

A. I didn't say that, not about the wire.

Q. Did you not make a statement in response to Mr. Hokanson's question that you couldn't tell whether anyone had worked on the wires in this steering engine motor? Do you recall that?

A. No.

Q. Do you recall having stated in response to a question on direct examination that you couldn't tell whether anyone had worked on the steering engine system?

A. Yes, I recall making that statement.

Q. How do you explain your subsequent answer, where you say it looked like the system had been tampered with?

A. Because when that system is out of adjustment, to put it back into adjustment it required the loosening of two nuts, as I have stated earlier, and I don't know how they could have become loose.

(Testimony of Lester C. Short.)

The Court: Did you find them loose?

The Witness: No.

The Court: Why do you discuss the looseness if you didn't find them loose? I do not see any point in your wasting that much of your time.

I wish we could confine our inquiries to the things that are calculated to bring out information that will [1374] help me, as the fact trier, to determine what caused this function and failure of the telemotor. I am not interested in anything else at the moment. I might be interested in the extent of damage.

Q. Isn't it possible that this broken wire that you found, the wire that was knocked off the contact, had existed prior to your arrival aboard the ship? A. No, it isn't possible.

Q. Why not?

A. Because the steering system would not function with that particular wire broken off.

Q. Isn't it possible that that wire in the condition in which you found it on your arrival aboard the ship at Port Angeles might have made contact and broken again, made contact and broken?

A. It is possible.

Q. In other words, it wasn't what you call a complete break in that wire, was it?

A. Upon the examination of the system at the outset, I found nothing that would indicate that there was any break in the wire whatsover. As I stated, I checked the system with my electrical

(Testimony of Lester C. Short.)

instruments and proved we had continuity of wiring.

Q. If this wire would make contact and break from time to time, wouldn't that in itself explain the hunting or [1375] oscillating of the system?

A. It would not.

Q. Why not?

A. Due to the way—due to the function of that switch in the circuit.

Q. Mr. Clarke has made a report of his survey at Port Angeles which has been admitted as Respondent's Exhibit A-7, in which he states as follows: "Upon arrival at Port Angeles, a launch was hired to transport workmen to the vessel, whereupon arrival on board it was found that steering gear mechanism was oscillating from side to side as much as 60°. The entire system was examined and a broken wire was found in the motor control wiring. From the appearance of this wire, it was evident that the break was not complete, but would make and break, thus causing the controlling motor to hunt. This trouble was corrected and the steering system was thoroughly tested to the satisfaction of the master and chief engineer."

Do you agree with that statement? A. No.

Q. Why not?

A. Because, as I stated, the particular wire that was broken there would not have caused a hunting condition.

Q. You found no air in the system?

A. We did not. [1376]

(Testimony of Lester C. Short.)

Q. Then what would cause the hunting of the system?

A. The improper mechanical relationship between the two moving parts of the upper system.

Q. Can you reduce that to simpler terms for us, or amplify it a little bit, please?

A. Poor adjustment between the electrical and the mechanical parts.

Q. And that condition might have existed for some time, isn't that true?

A. No, it couldn't have. The system wouldn't have worked.

Q. Would it have worked at all? A. No.

Q. Do you mean to say that the telemotor system would have been entirely inoperative then?

A. Well, it would have hunted.

Q. But you can't say that these nuts were loose when you first checked the system aboard the vessel?

A. No.

The Court: For my convenience, will you repeat your statement as to what caused the hunting?

The Witness: The improper relationship between the mechanical and electrical parts of the control unit.

Q. I would like to have you amplify that for us, if you could. I am not satisfied that we have the exact [1377] meaning of what you are saying there in rather technical terms.

A. Simply stated, the adjustment was such that two switches were turned on at the same time. One

(Testimony of Lester C. Short.)

switch would demand the system to turn to the right; the other switch would demand the system to turn to the left, and it would respond in turn to these two switches.

Q. And would that in turn cause the rudder to oscillate from one side to the other? A. Yes.

Q. Is that a constant condition, or is that a condition that might appear and then disappear?

A. The actual oscillating condition only shows up when the steering wheel is at rest.

Q. In other words, if your wheel was turned hard right, or so many degrees to the right, the oscillating wouldn't appear then?

A. That is right. The system would follow the wheel clear over to the right, and if the wheel were left there, then it would swing clear over to the right, and then it would leave that position and swing back to the left.

Q. What was there about the condition of the system as you saw it that led you to reach the opinion that the system had been tampered with?

A. The system worked properly during the sea trials.

Q. How do you know that? [1378]

A. I am informed by those that were on the sea trial.

Q. You don't have personal knowledge of that?

A. No, sir.

Q. How do you know that the system had been recently tampered with?

(Testimony of Lester C. Short.)

A. I didn't say I knew.

Q. You reached that opinion on the basis of some report you had received as to previous condition?

A. The ship's master told me that some distance before they reached Port Angeles, this system developed——

The Court: Do you mean this trouble in the system developed, is that what you mean?

The Witness: Yes, Your Honor, which naturally, according to his testimony, I was led to believe that the system had worked up to that time. Now, if something suddenly comes up that makes it cease functioning properly and I correct it by the changing of the position of the switches, by the adjustment I described, that would lead me to believe that it had been moved, the adjustment had been changed.

Q. You have no way within your personal knowledge of knowing what the condition of that telemotor system was when the ship left the Winslow yard of Commercial Ship Repair, have you?

A. No. [1379]

Mr. Howard: That is all.

Redirect Examination

By Mr. Hokanson:

Q. How large is the cover that was removed from the steering engine?

A. I would only be able to give you an estimate there. I would estimate it was about 10 inches high and about a foot square.

(Testimony of Lester C. Short.)

Q. Is it through that aperture that you had to work? A. Oh, yes, certainly.

Q. Could the maladjustment that you found have existed without an actual change in the setting of those controls by some person?

Mr. Howard: Objected to as leading.

The Court: The objection is overruled.

If you know.

A. I don't know.

Q. In the condition that you found the system, could it have operated successfully without hunting?

A. No.

Mr. Hokanson: I have no further questions.

Mr. Howard: No questions.

The Court: You may step down.

(Witness excused.)

HAROLD WELLS

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please.

A. Harold Wells.

Q. Where do you live?

A. Winslow, Bainbridge Island.

Q. What is your occupation?

A. Electrician.

(Testimony of Harold Wells.)

Q. For whom do you work?

A. Commercial Ship Repair.

Q. In what capacity?

A. At present, electrical foreman, Winslow Division.

Q. How long have you worked for Commercial Ship Repair?

A. Since they took over the Winslow yard.

Q. And that was when?

A. I do not recall the exact date.

Q. What was your occupation prior to that time?

A. Electrician.

Q. Where did you work? [1381]

A. At Winslow for another company.

Q. Was that the Winslow Marine Railway & Shipbuilding Company? A. Yes, sir.

Q. How long had you worked there?

A. Since 1942.

Q. In what capacity?

A. In various capacities, as leading man, assistant foreman.

Q. What other experience have you had in electrical work?

A. Generally, nothing beyond 1942 in the marine end.

Q. Were you working for Commercial Ship Repair at Winslow during the months of August, September and October 1948? A. Yes, I was.

Q. Do you remember the vessel Urania?

A. Yes, I do.

(Testimony of Harold Wells.)

Q. Did you do any work on her telemotor system?

A. We did some work on the electrical end.

Q. What did that consist of, if you remember?

A. The wiring to the micro-switches, or switches that have been previously discussed, was disconnected at the time the vessel was in the yard, when it came in. Another fellow, another electrician and myself went down and [1382] checked the wiring through and ascertained the proper hookup on the micro-switches, and it was connected and tested.

Q. In your presence? A. Yes, sir.

Q. Do you remember when that was?

A. The exact date, I do not.

Q. Did you see the telemotor system in operation after you had done your electrical work?

A. Yes, I did.

Q. For how long a period?

A. I should say over a period of possibly from one to two hours, I don't recall exactly, intermittently.

Q. Was it in proper operating order?

A. It appeared to be to me, yes, sir.

Q. Was there anyone else present when you saw it in operation?

A. Yes, there was another electrician I recall being there, the one who worked with me on it, and I believe some of the ship's crew. Who they were, I could not say.

(Testimony of Harold Wells.)

Q. Did you ever discuss the system with some of the officers of the vessel?

A. I did with the chief engineer, to the best of our ability.

Q. What was the nature of that discussion?

A. Trying to explain to him how the different systems [1383] worked, the operation of the thing, and also certain vulnerable switches that must be left on, and how to transfer from the wheel steering to your drum control steering.

Q. You have an alternate steering system on the vessel? A. Yes, sir.

Q. You gave him those instructions concerning the use of the alternate system?

A. To the best of my ability.

Mr. Hokanson: That is all.

Cross-Examination

By Mr. Howard:

Q. You said that these micro-switches were disconnected when you checked the system?

A. At first, yes, sir.

Q. How did you determine the proper hookup of those switches?

A. That was determined if the motor performed the function it was supposed to; in other words, when it was a righthand position the motor turned to, you turn the rudder in righthand position.

Q. It was a trial and error test, is that it?

A. In part, yes.

(Testimony of Harold Wells.)

Q. Do you know who the manufacturer of this system is? [1384]

A. At the time I don't think I knew.

Q. Did you refer to any wiring diagrams to determine the proper hookup of these switches?

A. I personally did not.

Q. After you had tried them out to see if they responded properly when the system was in operation, then you hooked up these micro-switches?

A. Would you reframe your question, please?

Q. Read the question, please.

(Last question read by reporter.)

A. I couldn't have; I had to hook up the micro-switches first before I could ascertain if it was operating.

Q. After you found that they responded properly when the system was in operation, you left the hook up as you had connected it? A. Yes, sir.

The Court: To whom did you say you explained this matter?

The Witness: The chief engineer, Your Honor.

Q. When was this check of the operation of the system made; while the ship was at the yard or while it was on its sea trial?

A. Prior to the sea trial, at the yard, dockside.

Q. You weren't present, then, when the system was in operation during the sea trial? [1385]

A. No, sir, I wasn't on the sea trial.

Q. Did the chief engineer seem to understand your explanation of these switches, etc.?

(Testimony of Harold Wells.)

A. I wasn't quite sure; in fact, I went so far as to give him a set of phones, telephones.

Q. Did you see the system at Port Angeles?

A. No, sir.

Q. The only time you saw this system was in operation was after you had connected up these micro-switches? A. Yes, sir.

Q. Did you find any other deficiency or defect in the telemotor engine in the steering engineroom at that time? A. Not that I recall.

Q. Did you do any other work on the steering engine motor, the telemotor in the steering engine-room at that time?

A. On the motor proper, not that I recall.

Q. Did you do any other work on the telemotor system? A. No, not that I recall.

Q. Do you know of your own personal knowledge whether anybody else at the shipyard did any other work on the telemotor system during the period the Urania was at Winslow?

A. I believe the machinist, Mr. Woodman, was down there at one time on the telemotor.

Q. While you were there?

A. I was there briefly at one time while he was there. [1386]

Q. What work was he doing?

A. I believe he was working on the telemotor lines. I couldn't tell you exactly what he was doing.

Q. How was the system tested during this one to two hour period of operation?

(Testimony of Harold Wells.)

A. By the operation of the wheel and also by the operation of the drum control.

Q. Of the drum control? A. Yes.

Q. Will you explain that, please?

The Court: Specifically state whether you have mentioned it by any other words before this or not.

A. The steering mechanism electrically may be operated in two manners. One is through control of the steering wheel through its telemotor setup, and the other is direct electrical control, which merely gives you a right rudder or left rudder with no follow up. In other words, it runs as long as the switch is held, we will say, to the right, it will run to the right. When this electrical switch is held to the left on this drum control, it will run to the left as long as the switch is held in that position, until it meets its limit switches at the end of its travel.

Q. And this drum control, this latter method, when it is in operation from the pilothouse, it will continue to turn the rudder through the steering engine one direction [1387] or the other until it reaches the end of its travel? A. Yes, sir.

Q. What effect would these micro-switches have on such an operation?

A. They are not in the circuit, I believe, at the time you are using the drum control. It is necessary to transfer electrically from one system to the other type of control.

Q. So that when the system was being tested on

(Testimony of Harold Wells.)

the drum control, any misconnection in the micro-switches would not be apparent?

A. I believe not.

Q. Let's go back to the other system—that is where you use the wheel in the pilothouse, isn't it?

A. Yes, sir.

Q. The transmitter wheel of the telemotor system? A. Yes, sir.

Q. What effect would the operation of that wheel have on the misco-switches? Would they be in use then? A. Yes.

Q. How do you know that the system was testd on the transmitter? A. I did it myself.

Q. Where did you go, up to the pilothouse to do that? A. I did. [1388]

Q. How could you tell if the system was functioning properly?

A. I had a man at the after steering flat.

Q. What effect would that have, having the man back there?

A. He knew whether it was operating or not.

Q. How could he tell?

A. By observing it. Also, you have an indicator that tells you when your rudder is moving, and that is located also in the wheelhouse.

Q. How long did you manipulate the transmitter wheel on the telemotor system in the pilothouse?

A. On the telemotor itself, I should judge probably up to an hour. I couldn't be sure, but approximately an hour, I would say.

(Testimony of Harold Wells.)

Q. Did you make any adjustment in the telemotor engine in the steering engineroom after that?

A. I did not.

Q. Did anyone else, to your knowledge?

A. I couldn't say. Not that I know of, I don't recall.

Q. Did you have to make more than one adjustment on the micro-switches before you got the proper hookup on them?

A. That I couldn't say for certain either.

Q. Why did you have to operate the system for an hour to test it out? [1389]

A. It was during the duration of an hour. It is common practice to run them back and forth to make sure they are functioning.

Mr. Howard: I have no further questions.

Redirect Examination

By Mr. Hokanson:

Q. Were you satisfied that the system was operating in a satisfactory condition when you completed your work? A. Yes, I was.

The Court: When, originally or at Port Angeles?

Q. Were you at Port Angeles?

A. No, sir.

Q. Then what time do you have reference to?

A. Prior to their sea trials.

Q. When you completed your work?

A. Yes, sir.

The Court: Where were you when the condition

(Testimony of Harold Wells.)

that caused you to express the opinion that somebody had tampered with the parts——

Mr. Howard: Your Honor, I believe this witness has not testified to any such condition. It was the previous witness who testified as to the tampering.

The Court: I believe that is correct, and the Court confused the two witnesses at the moment.

Mr. Hokanson: That is all, Mr. Wells.

Mr. Howard: No further questions.

The Court: You may step down.

(Witness excused.)

FRANK E. BLUMBERG

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please.

A. Frank E. Blumberg.

Q. Where do you live?

A. At 10013 Richwood Avenue, Seattle.

Q. What is your occupation?

A. I am a mechanical engineer.

Q. What licenses do you hold?

A. I hold a professional engineer's license in the State of Washington, qualified in mechanical engineering, naval architecture and marine engineering.

Q. What experience have you had as a marine engineer?

(Testimony of Frank E. Blumberg.)

A. I have served three years apprenticeship as a [1391] machinist doing mostly marine work; during the first World War I was a machinist's mate in the Navy and later as a junior engineering officer in which I was at sea about eight months. I had two and two-thirds years at the University of Washington, Department of Mechanical Engineering, and in the last 25 years I have practiced mechanical engineering or marine engineering. That includes the period from December of 1940 to July of 1947 as assistant chief engineer at Todd Pacific Shipyards, Seattle Dvision. During that time I had charge of the engineering department, the machinery division of the engineering department.

Q. What is your present position?

A. At present, I am self-employed, in a partnership.

Q. In what business?

A. Mechanical engineering and naval architecture and marine engineering.

Q. Are you acquainted with the Harrison type heat exchanger? A. Yes.

Q. Are you acquainted specifically with Model HE 1120-360, the lube oil cooler, Harrison type?

A. Yes.

Q. Do you know the type of construction in the Harrison cooler of the type mentioned?

A. Yes, reasonably well, sir. [1392]

Q. In your marine engineering experience, have

(Testimony of Frank E. Blumberg.)

you had anything to do with the cleaning and testing of Harrison type heaters?

A. Yes, it has been done under my direction at times.

Q. Where?

A. At the Todd Pacific Shipyards.

Q. Were you in court on Thursday when Mr. Oakland testified? A. Yes, I was.

Q. Did you hear his testimony with reference to the method he used in cleaning and testing certain heat exchangers and oil coolers? A. Yes.

Q. Referring to his testimony with respect to the method used on cleaning and testing, what is your opinion as to the method used?

Mr. Howard: Just a minute, please. I challenge the qualifications of this witness to express an opinion on the proper methods of cleaning and testing a Harrison type cooler. I recognize that this man has traced some experience in marine engineering work and employment at Tood Shipyards, and he has stated that they have cleaned and tested such coolers at Todd Shipyards, but I submit that is an inadequate foundation or basis for him to express an opinion as to the proper methods, or the [1393] propriety of the method used by Mr. Oakland at the Winslow shipyard.

The Court: In view of the objection, does counsel inquiring approve of submitting a supposititious question upon the facts which he thinks have been testified to by some witness, and all of those which

(Testimony of Frank E. Blumberg.)

are material, in asking if such a procedure is an approved procedure in the field of engineering which is involved?

Mr. Hokanson: If I understand the Court correctly, it is proposed that I propound a question including the various steps taken by the witness heretofore referred to, rather than to refresh his memory by directing his attention to what he heard on Thursday?

The Court: Particularly when there is objection to doing it that way, it never seems to the Court appropriate to have one witness comment upon the quality of another witness' testimony.

Mr. Hokanson: Very well, Your Honor.

Q. Assume that the Harrison lubricating oil cooler Model HE 1120-360 with a rated operating pressure of 7 pounds on the salt water side and 18 pounds on the lubricating oil side is taken to a pipe shop in a shipyard where the plates are taken off the ends and Jamlen compound chemical is used in cleaning the salt water side by flushing it through for a period of 4 hours; and upon the completion of that process the salt water side is flushed out with water and thereafter is blown out with an air hose; and assume that the lubricating oil side is cleaned by the use of Jamlen oil compound in accordance with factory instructions, is flushed through the oil side for a similar period and that side is thereafter blown out with air with an air hose; that the cooler is then subjected to a hydro-

(Testimony of Frank E. Blumberg.)

static test under water on the salt water side of 50 pounds for a period of 20 minutes and no leaks are disclosed: what is your opinion as to the method used?

Mr. Howard: I object to that hypothetical question because I submit to Your Honor it fails to include several important factors. First of all, this witness has not testified that he is acquainted with or knows of this Jamlen solution that was used. Secondly, as I recall the testimony of Mr. Oakland, he testified to putting some acid in on the salt water side first to circulate it for a certain period of time, which has not been included in this question.

I also object on the ground that the question does not indicate the temperature at which this cleaning fluid was put into the system for the purpose of cleaning it; and lastly, on the ground that the condition of the cooler at the time of the test has not been indicated so as to show the extent of cleaning that might be [1395] required. I submit to Your Honor that might vary materially according to the condition of a particular cooler.

The Court: The objection is sustained, with leave to modify the suppositious question by stating conditions involved.

Q. Assume further that in this test the cooler in question has been out of use for some period of time but otherwise was in good condition; assume that the acid referred to is a Jamlen chemical used in cleaning heat exchangers and that the same was

(Testimony of Frank E. Blumberg.)

heated to a temperature of 70 to 80 degrees while circulated through the salt water side: with those assumptions in mind, first let me ask you, do you know what the reputation of Jamlen cleaning compound is for use in heat exchangers?

A. I know Jamlen cleaning compound by reputation only. I have never used it.

Q. What is the reputation, if you know?

A. The reputation is that it is a satisfactory cleaning compound.

Q. Having heard the assumptions, do you have an opinion as to the method used in cleaning the heat exchangers?

Mr. Howard: I object to the question on the basis of the witness' own testimony that he has never used Jamlen's cleaning compound, knows it by reputation only, [1396] and that this witness cannot testify to the reliability of a cleaning compound he knows by reputation only. They have endeavored to qualify him as an expert and are asking a question which includes the factor of the adequacy of a particular type of cleaning compound which he has no direct knowledge of. He has so testified.

Q. Assuming that Jamlen is a recognized and accepted and satisfactory cleansing agent for use in this type of cooler, what is your opinion as to the method used?

Mr. Howard: I renew my objection on the same ground, that that is an assumption that cannot be made on the basis of the evidence in this case.

(Testimony of Frank E. Blumberg.)

Mr. Hokanson: Mr. Gilmore stated emphatically that Jamlen was a recognized and excellent cleaner for use on these coolers.

Mr. Howard: He was then testifying to his opinion based on his own knowledge of that cleaner, but this witness has no such knowledge.

The Court: The objection is overruled.

A. I think that was a satisfactory method of cleaning and testing the lubricating oil cooler.

Q. If you know, does that conform to the shipyard practice in this area?

A. Yes, that conforms.

Mr. Howard: Same objection, if the Court please, [1397] continued to these subsequent questions.

The Court: Is there any objection to that?

Mr. Hokanson: I have no objection to a continuing objection.

The Court: The Court approves.

Q. Assuming the facts heretofore given you with respect to cleaning method used; and assuming that the cooler in question had a plate on the outside giving a test pressure figure of 300 pounds, taking into account the operating pressures which I have already included in the question: would your opinion be the same as to the propriety of the method used? A. Yes.

Q. Why?

A. Because the test pressure stated on the name plate is a factory test pressure. It is put on there

(Testimony of Frank E. Blumberg.)

to prove the factory's own design and workmanship.

Q. Is it the practice in shipyards, if you know, to test at the pressures given on these plates?

A. No, not generally.

Q. Why not?

A. Because they test according to the use to which the apparatus is to be put.

Q. Is it the practice in shipyards to test coolers with air pressure under water, if you know? [1398]

A. No.

Q. Why not?

A. Because the hydrostatic test is safer and is considered satisfactory.

Q. When you say "hydrostatic test", would you explain what that is to the Court?

A. A hydrostatic test is filling the interior of, we will say, a cooler with water and then subjecting that to a pressure somewhat higher than the usual working pressure. In case of a failure during that test, there would be no injury to personnel, but if it were tested with air and there were a failure, there might be an explosion resulting from the expansion of the air.

Q. Assume that the same cooler in question was put in a vat of L 27 caustic solution and boiled at a temperature of 212° Fahrenheit for a period of four hours: could that in your opinion cause leaks around the seams where the soldered joints of the plate meet the housing?

Mr. Howard: I will object to that hypothetical question on the basis that he has asked the witness

(Testimony of Frank E. Blumberg.)

about a certain L 27 compound. The witness hasn't testified one way or the other whether he knows anything about this compound. I object further on the ground that counsel has used the figure of 220° Fahrenheit. I submit to Your Honor that the record in this case does [1399] not show that the cooler was cleaned at any time at such a temperature.

Mr. Hokanson: May it please the Court, I believe counsel is mistaken when he quoted me as having said 220. I said 212.

Mr. Howard: Perhaps I misunderstood you. The same objection.

Q. Are you acquainted with a compound known as L 27? A. No, sir.

Q. Assuming L 27 is a caustic and is a fluid, would its characteristics be any different at a boiling temperature, insofar as its effect upon the expansion of metal is concerned, than water?

Mr. Howard: If the Court please, the assumption that a certain L 27 compound is a caustic seems to me to be entirely inadequate to enable this witness to reply intelligently to such a question. Caustic is a rather broad term. Unless counsel can establish the chemical qualities of L 27, I submit that any such assumption in a hypothetical question to this witness is improper.

The Court: The objection is sustained.

Mr. Hokanson: May it please the Court, the only evidence we have as to what L 27 is in the record is by the cross libelant's witness, who stated that

(Testimony of Frank E. Blumberg.)

it is a [1400] caustic compound. I will, however, attempt to reframe the question.

Q. Assuming that a proper cleaning fluid for the cleaning of a heat exchanger of this type is heated at 212° Fahrenheit and that the cooler is immersed in this cleaning fluid for a period of four hours at that temperature; have you any opinion as to whether that could cause fractures in the soldered joint of such a cooler?

Mr. Howard: I renew my objection on the ground that the testimony does not show that the cooler was ever immersed in a solution at 212° Fahrenheit. I call Your Honor's attention to the testimony of Mr. Weiler, who on cross-examination by Mr. Hokanson indicated that the cooler was immersed in the tank at about 180°, and he explained why that was done, so he wouldn't get a lot of steam in his face. If it had been immersed at a 212° Fahrenheit boiling temperature——

Mr. Hokanson: I regret to have to correct Mr. Howard, but the witness' testimony was——

The Court: Name the witness.

Mr. Hokanson: Mr. Weiler. ——that when he first put the cooler in the tank, he reduced the temperature so as to eliminate steam in his face, and then increased it to the boiling temperature.

The Court: If you have before you the record, why [1401] do you not cite the record and read it, rather than make argument?

(Testimony of Frank E. Blumberg.)

Mr. Hokanson: Directing the Court's attention to page 179:

"Q. Now, when you introduced these heat exchangers into the solution, is the thing boiling at that time?

A. Well, it may or it may not be.

Q. Do you remember whether it was in this case?

A. No, it wouldn't be.

Q. Well, now, I want you to answer from your recollection and not by reasoning it out, Mr. Weiler.

Mr. Howard: Let him finish his answer, counsel.

The Witness: Well, I know it wouldn't be, because if it was boiling and you raise the lid on the tank, all of the steam will come right up in your face, so, anyway, every time I go there I cut it off to reduce the boiling so that I can at least get it in the tank, and that is another thing that I will put in the tank with a hoist.

Q. That would be still high temperature when you introduce them into the tank?

A. Yes, I would say it was around 180—something below boiling.

Q. So you wouldn't have the steam in your face?

A. Yes. [1402]

Q. And then you would increase it to boiling?

A. Yes; I would close the lid and increase the heat."

The Court: Let that condition in that form be stated to the witness. I believe your statement is in a little different form.

(Testimony of Frank E. Blumberg.)

Q. Assuming that the particular cooler was placed in a proper cleaning fluid, or a heat exchanger of this type under the circumstances explained in the questions and answers that you have just heard; and that after being placed in such a vat was boiled for at least three hours at 212° Fahrenheit: would you have any opinion as to what effect such a process could have upon the seams or soldered joints of the cooler?

Mr. Howard: I will have to renew my objection on the basis of there being no testimony, as counsel has now assumed, that it was introduced at a temperature as described in Mr. Weiler's testimony and then boiled for three hours.

Mr. Hokanson: I am trying to reduce it in your favor, counsel. Earlier, I said four hours.

The Court: The Court will indulge about another minute to get this question straightened out. If you do not succeed in that time, the Court will ask you to pass on to something else. [1403]

Mr. Hokanson: Page 171, Mr. Weiler's testimony:

"Q. What did the boiling process consist of?

A. It consisted of putting them in a tank and boiling them to get the scale loose.

Q. For how long did you do that, approximately?

A. For three or four hours—something like that."

Mr. Howard: I waive my objection.

The Court: Mr. Witness, do you know what ques-

(Testimony of Frank E. Blumberg.)

tion is before you? Do you think you have it in mind?

The Witness: I think I do, sir.

The Court: What is it you wish him to answer?

Q. The question I asked is: what is your opinion, if you have one, concerning what the effect of such a process of cleaning would be upon the soldered joints of this heat exchanger, with which you have established you are familiar?

A. I believe that due to unequal expansion of metals in there, it is possible that there could be leaks caused by that temperature.

Q. If you know, is it possible for leaks to develop in this type of heat exchanger around the soldered joints while a vessel is at sea when carrying such a type of cooler on its engine? A. Yes.

Q. How? [1404]

A. By engine vibration; by it being installed in a cramped condition—that is, perhaps not fitting accurately or not fitting accurately on its foundation. There may be action from the salt water, especially if any foreign matter was carried in it.

Q. Assume the facts I have heretofore given you with respect to the cleaning of this cooler in a temperature of 212° Fahrenheit; and assume that after that process is completed the cooler is immersed in water and air pressure of 160 to 200 pounds is applied to the salt water side with the result that leaks are seen around the seams as evidenced by air bubbles the size of a pen point; and further keeping in

(Testimony of Frank E. Blumberg.)

mind that the leaks around the seams are not detectable by visual means: what is your opinion as to the method of testing used?

A. In the first place, I would not care to be present during that test because——

Mr. Howard: I move to strike that part of the answer.

The Court: The motion is granted.

Just answer the question.

Q. What is your opinion?

A. The test is an extremely severe one.

Q. Why?

A. Because a test of air under water of 160 to 200 [1405] pounds would be—a quite common air test for valves or fittings which are used is an internal working pressure of steam or water of say 600 pounds per square inch.

Q. Can you compare the air pressure test with the hydrostatic test in terms of its ability to show leaks?

A. A hydrostatic test is put on at one and a half to two times the usual working pressure to show leaks and to show strength. An air test is used to show porosity only.

Q. What do you mean by porosity?

A. Small holes, very fine cracks through plate or casting or anything making the wall.

The Court: Do you or do you not mean a porous condition?

The Witness: Yes, a porous condition.

(Testimony of Frank E. Blumberg.)

Q. Do you have something further to add to the answer to the previous question?

A. And an air test is usually only a fraction of the usual working pressure.

The Court: Court will be in recess for ten minutes.

(Recess.)

Q. Mr. Blumberg, are you able to compare an air test under water at 160 pounds with a hydrostatic test?

A. An air test of 160 pounds under water is usually applied to a fitting or a valve or casting, a pressure vessel of some kind, that would have a previous hydrostatic [1406] test of say 800 to a thousand pounds.

Q. Is that its equivalent in hydrostatic pounds?

A. That is the approximate equivalent for determining porous condition.

Q. Assume that leaks in a cooler are indicated by an air test under water of 160 pounds disclosed by air bubbles the approximate size of a pen point: in your opinion would it be possible to get salt water through leaks of that size at an operating pressure of 7 pounds? A. No.

Q. Assume that with respect to this same cooler an auxiliary pump is applied capable of delivering 100 pounds pressure: in your opinion could water get through leaks of the size described under those conditions?

(Testimony of Frank E. Blumberg.)

A. I doubt very much if water would get through.

Q. Further assume that when the cooler is assembled a gasket covers the seam where the leaks occurred: what is your opinion as to whether water could get through under those circumstances?

A. My opinion is that water would not get through.

Q. Assume that a Diesel powered vessel leaves Puget Sound; assume that the lubricating oil is cooled through a Harrison type cooler of the type heretofore described; assume that that cooler has leaks at the seam as evidenced by bubbles of air that I have described to you; assume that [1407] that vessel travels for a period of ten days and its history during that period is one of smooth operation; assume that the lubricating oil through the cooler is operated at a pressure of 18 pounds and that the salt water is operated through at a pressure of 7 pounds; assume that ten days after the commencement of the voyage the lubricating oil is changed; and assume that on the following day the helical timing gears of the Diesel engine, operating on a vertical shaft, become galled: could the galling of those gears, in your opinion, be caused by contamination of the lubricating oil resulting from salt water getting through the leaks in the cooler described?

A. My opinion is that salt water would not be the cause of that galling.

(Testimony of Frank E. Blumberg.)

Q. Why not?

A. Because I believe that there would not be—if any salt water did leak through, it would not be enough to cause trouble. I doubt very much if any salt water would leak through.

The Court: Did you consider any information as to how long the gears had been in operation before the first galling was discovered? State yes or no.

The Witness: I don't quite understand the question, Your Honor.

The Court: As I understand it from the evidence, [1408] it tends to show that one day the galling showed up. I think the evidence shows that the gears operated some days before that happened. Then, as I understand it, the evidence tends to show that the oil was changed after the first galling condition was discovered, and another gear was substituted, and then shortly thereafter another galling occurred.

Did you in considering the question of galling or determination of it consider all of those circumstances about previous operation of the gears without galling, and on one day the galling was noticed to have occurred, the gears were changed, and after certain other operations further galling was found?

The Witness: Your Honor, I considered the matter that it had run for approximately ten days and that the oil was changed, and approximately a day later there was galling of the gears.

(Testimony of Frank E. Blumberg.)

The Court: Do you know which gears with reference to the ones in use during the first ten day period were involved in the galling condition you are now talking about?

The Witness: Yes, sir.

The Court: Which ones?

The Witness: The lower.

The Court: Was it the same gear or different gears [1409] that had been in use during the ten day period?

The Witness: It was the same gear.

Q. Under the conditions described, and calling your attention again to the fact that the vessel operated successfully for ten days with no hint of any trouble in these gears, whereupon the oil was changed and the day following the gears, the lower helical timing gears, became galled: what would you look for as a cause for the galling under those conditions?

A. I would rather look to contamination of the new oil that was put in the engine.

Q. Is there anything else that you would look for? A. Possibly——

Q. I will withdraw the question and give you further facts. Assume the facts that I have just stated; and assume that after the lower helical gears on this vessel became galled the vessel put into port; and that a day or two later a service man or service engineer came aboard the vessel and upon inspecting the same found that the oil had been re-

(Testimony of Frank E. Blumberg.)

moved from the engine; that when he arrived the gears were dismantled and on the deck, the helical timing gears and the vertical shaft which holds them; that he further found the vertical shaft to be bent, upon chucking it in a lathe and found that it was out of true about one-eighth of an inch, according to his estimate; assume that [1410] he had it straightened in the lathe and found it true and reinstalled the same; assume further that he found that the fuel controls on the engine were badly set, requiring the resetting of all of them; assume that he inquired of the vessel's history prior to the galling of the gears and learned from the chief engineer that the engine had been running hot; and assume that the chief engineer indicated to him further that something had been done to the lubricating oil line running to the lower gears which were galled; assume that he found some wear in the thrust bearing of the vertical shaft which is of the roller type but that he considered it insufficient to require replacing it and so reinstalled the same; assume that he further found that the air, water and lubricating oil lines on the engine were badly kinked; assume that he didn't like the looks of the rest of the engine; assume that he found that the control station wouldn't work properly; assume that he wanted to take out the nozzles but he didn't have the facilities; and assume that he felt that there was some further deficiency of the engine but that the only thing he did was to replace the galled

(Testimony of Frank E. Blumberg.)

timing gears and to cause new oil to be placed in the system; and assume that in installing the lower timing gears he was satisfied that they were in proper alignment from the tests that he made; and assume further he installed an additional lubricating oil line to the lower [1411] vertical gears in addition to the line already existing: do you have any opinion as to what could have been the cause of the galling of the gears prior to the vessel's putting into port?

Mr. Howard: If counsel wants to add an additional assumption that the lubricating oil that was in the engine had been flushed out and the lubricating oil system had been flushed out prior to the installation of the second set of gears, I will offer no objection to the hypothetical question.

The Court: Does the evidence so tend to show?

Mr. Hokanson: Only on a hearsay basis, Your Honor.

The Court: What is the evidence before the Court upon whatever basis it is?

Mr. Hokanson: My recollection is not clear as to whether the Court sustained my objection when Mr. Cross testified he had no personal knowledge of the flushing out of the system.

Mr. Howard: My recollection, if the Court please, is that that came in in Mr. Cross' deposition to the effect that he had been informed by the chief engineer that the system had been flushed out and that he would not have allowed new oil to go into the system unless it had been flushed out.

(Testimony of Frank E. Blumberg.)

I want to shorten this. If counsel will add that assumption that the system had been flushed out, I will offer no objection to the hypothetical question.

Mr. Hokanson: I will agree that the lubricating oil had been removed, but as to the method of flushing out, I think that assumption cannot be made because the witness testified he does not know of his own knowledge what method was employed. That was brought out on the examination and I can demonstrate it by the deposition.

The Court: Are you going to refer to something you think will cause counsel to agree upon proper form of statement of the condition?

Mr. Howard: On page 44 of the Cross-deposition, Line 3:

"Q. You did not ascertain what had been done to flush that oil out of the system?

A. Yes, I did.

Q. And foreign particles?

A. Yes, I did. I didn't ascertain how they got it out. I made certain that it had been ashed out. The foreman had some laborer remove the——

Q. I didn't understand your last answer."

* * *

"Q. By Mr. Hokanson): Was it at your request that the whole system was flushed out?

A. It had been done prior to the time of my arrival." [1413]

The Court: Would it not be proper to submit

(Testimony of Frank E. Blumberg.)

the condition that the system had been flushed out by some——

Mr. Hokanson: One further question:

"Q. So you don't know what actually was done by way of washing it out of your own knowledge?

A. No, only that when I got on board it was clean.

Q. To the extent that you examined the engine it was clean? A. That is correct.

Q. Did you inspect all of the lubricating oil lines that serve the entire engine?

A. No, I did not."

The Court: Would it not be proper to add to the question, "assuming that the system had been flushed out by some means"?

Mr. Hokanson: With the qualification that the service man did not inspect the lubricating oil lines personally to determine the extent to which they were cleaned.

The Court: Now restate the additional condition.

Q. Assume further that with respect to the lubricating oil that had been in the system prior to the vessel's arrival in port, that the same had been flushed out prior to the service man's arrival, but that the method used was unknown to the service man and that he did not personnel [1414] inspect all of the lubricating oil lines that lubricate the engine: are you now able to state an opinion as to what could have caused the galling of those gears?

(Testimony of Frank E. Blumberg.)

The Court: State yes or no.

A. Yes, I am able to state an opinion.

Q. What is that opinion?

A. The opinion is that there was something radically wrong with this engine. There are indications of it by the vertical shaft having been bent, requiring straightening; the pipes mentioned were badly kinked; the engine had overheated.

Now, those are indications of something radically wrong, especially the overheating of the engine. This may have been a local overheating causing the bearings of the camshaft to come out of line, putting an extra load on the gears. Because of the heavy bearing loads with this out of line, there may have been a clogging somewhere in the oil lines to the helical gears that would result in a lack of quantity of lubricating oil to the gears.

Q. What effect would kinked lines have?

A. Kinked lines could restrict the flow of the liquid content in them, or the fluid.

Q. Assume these further facts; assume that the vertical shaft drives the fuel pump; assume that prior to the galling of the gears on October 21 the engine was [1415] stopped for 50 minutes to repack the fuel pump, and assume that on October 24 a tightening of the packing installed in the fuel pump——

Mr. Howard: I don't understand this last assumption, "a tightening of the packing."

Mr. Hokanson: A tightening of the packing in

(Testimony of Frank E. Blumberg.)

the fuel pump was done: in your opinion, would that have any relationship to the galling of these gears?

Mr. Howard: If you know.

A. Yes, it would have some relationship to it. That would increase the load on the gears.

Q. Could you explain that further?

A. The packing gland on the fuel pump—and I am assuming that the fuel pump is driven through the helical timing gears—that tightening, if tightened too much, will cause the shaft in the fuel pump to be restrained considerably, introducing a friction at that point and requiring a much higher load on the gears to drive the pump.

Q. Under the assumptions that I have given you concerning what was found by the service man; and assuming that he merely replaced the lower helical gears without causing any further checks to be made with respect to this engine other than ascertaining that the alignment of the gears was proper at the time of the installation: do you have an opinion concerning the practice that he followed?

Mr. Howard: I object to that question, if the Court please, in that it doesn't contain assumptions that should be in a hypothetical question based upon the evidence in the record as to the other checks and tests that were made by service engineer Cross at the time he arrived at Manzanillo and made an inspection on board the vessel.

(Testimony of Frank E. Blumberg.)

Mr. Hokanson: May it please Your Honor, I have no recollection of any further tests other than those I have included in the assumptions contained in the question.

The Court: Read the question.

(Last question read by reporter.)

Mr. Howard: I am referring to pages 6, 7 and 8 of the Cross-deposition. Without reading all of that, I will try to check the points I am referring to.

"Q. Did you make any further inspection of the engine other than what you have already mentioned on your first inspection?"

The first inspection, if the Court please, refers to the gears and vertical shaft.

"A. Not on the first inspection, no.

Q. Later did you make a further inspection of the engine to determine its condition?

A. Yes, I took the vertical shaft ashore" . . .

Then he describes the conditions he found the vertical shaft to be in.

"Q. What additional work did you do about the engine?

A. You mean in all respects, repair work?

Q. Yes.

A. Well, I checked the alignment of the gears when I installed them.

Q. Which gears please?

A. Both the upper and the lower.

Q. What did you find as to the condition of the alignment?

(Testimony of Frank E. Blumberg.)

A. Very good. I checked the fuel controls. They were pretty badly set. I had to reset all the fuel controls.

Q. Will you go ahead please?

A. Installed a new oil line to the lower vertical shaft gears.

* * *

Q. Was additional work done on the vessel, on the maintenance of the engine by you?

A. What do you mean by additional work?

Q. I just want to be sure that you have testified for the record as to all of the work that you performed on the main engine?

A. Yes, that was done by me. There may be some [1418] items I missed, small items that I don't recall right now."

I am certain that in this witness' testimony he testified he checked thrust bearings, main bearings and other parts at the time the ship was in Manzanillo. It is probably in the cross-examination.

Mr. Hokanson: Your Honor, I have examined it, I think, reasonably carefully, and I confess that I omitted to point out in the assumptions that the fuel controls were reset and that prior to the departure the vessel was retimed, but beyond that I think I have included essentially everything that was done, including, if the Court please, the fact with respect to the thrust bearing.

The Court: Including the material mentioned by Mr. Howard just now?

(Testimony of Frank E. Blumberg.)

Mr. Hokanson: Yes.

The Court: Will you make the addition which you indicate should be made?

Mr. Hokanson: Assume in addition to the facts that have already been given you that the service man reset the fuel controls and checked the timing of the engine, or caused the engine to be retimed before leaving: what is your opinion—or do you have an opinion concerning the practice he followed? [1419]

A. Yes, I have an opinion.

Q. What is that opinion?

The Court: The objection is overruled.

A. I believe that he did not follow up the cause of this overheating of the engine as he should have done. Overheating of a Diesel engine is a serious thing, and the cause of that overheating may have been the cause of the failure of the gears, or the overheating itself may have caused the failure of the gears.

Also, the thrust bearing being worn may have caused a vibration, a vertical vibration in this vertical shaft which would have caused unequal loading on the gear teeth, some of the teeth getting excessive loads and other teeth getting very light loads.

Q. Assume that after the gears were installed the engine was timed for approximately two or two and a half days, and upon the completion of the timing the vessel was run full ahead and it was then discovered that the valves were hitting the

(Testimony of Frank E. Blumberg.)

pistons: do you have any opinion as to what the effect of that would have been upon the gears?

A. The serviceman——

Mr. Howard: Answer yes or no, if you can.

A. Yes, I have an opinion.

Q. Would you state what it is?

A. A serviceman, according to my experience, would [1420] time the engine according to the marks on the flywheel at the factory, following factory practice, and if the engine was in otherwise good condition, the valves would not hit the pistons; but if they hit the pistons it indicates that there was some wear or some maladjustment regarding the cams or the rocker shafts or bearings around the valves or the valve-operating mechanism.

Q. In timing an engine, can it be ascertained on a Diesel engine before running the vessel on trial whether the valves are hitting the pistons?

Mr. Howard: Are you speaking of any particular Diesel engine, counsel?

Q. Let's assume a six cylinder, 560 horsepower four cycle Union Diesel engine.

A. Before running the engine—if the valves struck the pistons heavily it could be determined before operating the engines, but if there is only a very light interference, the engines would have to be operated to determine that.

Q. Assume that after the timing had been completed the vessel then put out to sea and after being under way for 29 hours, the gears were checked by

(Testimony of Frank E. Blumberg.)

the service man and found to be in satisfactory condition; but that at that time it was determined that notwithstanding that the pyrometer readings were normal the engine was overheating from a cause unknown, and that this occurred at or about 9 p.m. on [1421] November 4, 1948; and that the chief engineer, contrary to the directions of the service man, then caused an auxiliary pump capable of delivering a pressure of 100 pounds to be put in operation through the oil cooler and heat exchangers; and assume further that approximately seven hours later the service man was notified of a noise in the engine and upon arriving in the engineroom determined that the gears again were affected: do you have any opinion as to what might have been the cause of the second galling of the gears?

A. Yes, I do.

Mr. Howard: I object to that question on the ground that I submit to Your Honor there is no evidence in the record that an auxiliary pump was put into operation on November 4 and hooked up to the oil cooler system. I don't deny there is evidence in the record that an auxiliary fire pump capable of producing 100 pounds pressure was put into operation, but I submit to Your Honor there is no testimony it was hooked up to the oil cooler system.

Mr. Hokanson: May it please the Court, I am completely satisfied that there is evidence in this record, both in Mr. Newell's deposition that the

(Testimony of Frank E. Blumberg.)

pump in question was hooked up to the heat exchangers and cooler; and I am satisfied that it is clear from Mr. [1422] Cross' testimony that that is the case. I don't want to take the Court's time by searching further for the particular places, except that inferentially, at least, on page 75 of Mr. Cross' deposition——

The Court: Are you abandoning the question, or what are you proposing?

Mr. Hokanson: My statement is that the question includes proper assumptions. I am merely calling to the Court's attention my recollection of what the evidence shows.

The Court: Will you cite in the record, Mr. Howard, what it is your objection is based on?

Mr. Howard: If the Court please, the fact that there is nothing in the record showing that it was hooked up to the oil cooler.

The Court: Point out the place where those two matters are given, and this is the last supposititious question. I think we have had enough time indulged in the trial of this case, and I ask counsel on both sides to shorten it.

Questions of this nature propounded to an expert witness should have been worked out in the absence of the Court on an accurate basis. You should be able to facilitate these inquiries.

Mr. Hokanson: On page 75, Your Honor:

"Q. Did you make any suggestion one way or the other to the chief engineer as to the use of the

(Testimony of Frank E. Blumberg.)

standby pump after the difficulty was reported to you at four a.m. on November 5th?

* * *

A. I don't believe I did after the trouble. After they had the trouble with the gears there was no necessity of doing it. The engine was running so slow there was no trouble at all keeping it cool."

That, Your Honor, I submit has reference to the cooling device for the engine, and the pump in question is tied in.

"Q. What is your recollection as to the suggestion that was made?"

——referring now to the use of this pump——

* * *

"A. I believe I recommended it not be used.

Q. (By Mr. Howard): What would be the basis of that, Mr. Cross?

A. It is not a good idea to overcome your pressures. There are times when it has to be done. I don't like to do it when the regular pump is fully capable of maintaining the pressures and temperatures that were recommended by the factory without the use of auxiliary equipment." [1424]

The Court: The point I wish to make in this connection is this: that you run a great risk of putting your interpretation upon the testimony. You should state the condition in the words of the witness and not in the effect which you put upon

(Testimony of Frank E. Blumberg.)

that condition. That is the trouble with your question.

Mr. Hokanson: I didn't anticipate that there would be any question about the fact that there is evidence in the record as to the hook up of this pump. However, in order to expedite this proceeding, I will eliminate from the question propounded to Mr. Blumberg the assumption that the pump was put into operation at that time, and ask him whether he has an opinion as to what was the cause of the second galling of the gears?

Mr. Howard: As I understand your question, there is no assumption propounded to this witness in the question that any auxiliary pump was placed in operation aboard the vessel prior to the second breakdown and galling of the gears?

Mr. Hokanson: For purposes of this question, that is correct.

Mr. Howard: Not other objection.

The Court: What is the form of the termination of the question addressed to the witness?

Mr. Hokanson: It is whether he has an opinion.

The Court: State yes or no.

A. Yes, I have.

Q. What is that opinion?

A. My opinion is that there was still something radically wrong with the engine, either parts badly worn or parts out of adjustment somewhere that were not examined. The matter of overheating being so serious, I believe that that vessel should not

(Testimony of Frank E. Blumberg.)

have been put to sea until the cause of that overheating was found and corrected.

Q. Showing you what is known in this proceeding as Cross Libelant's A-20, which purports to be an analysis of lubricating oil, I will ask you first whether you are acquainted with the requirements of viscosity and percentages of foreign matter in lubricating oils in connection with the lubrication of Diesel engines?

A. Yes, I am acquainted with them.

Q. Would you examine the ananlysis and state whether you have an opinion as to whether the oil in that case would be of sufficient viscosity and be otherwise proper for the lubrication of a six cylinder Diesel engine?

A. I note the viscosity of 545 with the oil at 100° Fahrenheit. That appears a little bit high, but should be satisfactory.

The Court: High in what characteristic?

The Witness: High in this, that a high number in [1426] viscosity means a thick oil, one that is difficult to flow. A low number of viscosity means one that is easy to flow. This oil would be what is often called a heavy oil, not referring to weight, but referring to its ability to flow through an opening or through a pipe. This is a little heavy, but should be satisfactory.

Q. Do you note the percentage of water shown?

A. Yes.

Q. What is your opinion with respect to its

(Testimony of Frank E. Blumberg.)

effect upon the oil as a lubricating agent for a Diesel engine?

A. That should have little effect on the lubrication of a Diesel engine for a period of many days or weeks provided the engine is kept operating all the time.

Q. Assuming that the galling of the timing gears of this vessel as heretofore described occurred; assuming that no other gears or bearings of the main engine lubricated by the same oil were affected; and assume that contaminated lubricating oil is traced as the cause of the galling of those gears: in your opinion, would it be possible to have a galling of those gears without affecting other parts?

A. Yes, I think I can answer that.

Q. Do you have an opinion?

The Court: Answer counsel's question.

A. Yes, I have an opinion.

Q. Will you state what it is? [1427]

A. The galling of the timing gears without any—at the same time there was no effect on the crankshaft bearings indicates that there was nothing wrong with the lubricating fluid.

Q. Why?

A. Because if there was foreign matter in the lubricating fluid, some abrasive material, the bearings of the crankshaft and the crank pins would have become scored; that is, little grooves around it caused by your abrasive material.

(Testimony of Frank E. Blumberg.)

The Court: Did the damage to the gears have the appearance of such abrasive action?

The Witness: I have no knowledge as to whether the damage to the gears showed abrasive action or not.

Q. If you know, what is the practice in shipyards insofar as the responsibility of the shipyard is concerned for repair work done to the main engine of a vessel under repair in the yard where the work done on the main engine is under the supervision and direction of the chief engineer of the vessel, assuming that trouble later develops on that engine?

Mr. Howard: I object to that question on the ground that it is asking the witness to state an opinion as to something which I submit is within the province of Your Honor to decide.

The Court: In view of the relationship of the witness to the facts and occurrences involved in this case, the objection is sustained.

Mr. Hokanson: No further questions.

Cross-Examination

By Mr. Howard:

Q. When it comes to the cleaning of a cooler such as was discussed with you in your earlier testimony, isn't it a fact that the condition of the cooler prior to the testing would have considerable bearing on the extent of cleaning necessary? In other words, if you had a clean cooler, a relatively clean cooler,

(Testimony of Frank E. Blumberg.)

it wouldn't require as much of a cleaning as a cooler that had accumulated considerable dirt or scale, isn't that true? A. Yes, that is true.

Q. If you had a cooler with considerable dirt and scale, from your experience you would see that that got more of a cleaning that a relatively clean cooler?

A. The relatively dirty cleaner would require a little longer time, but the outer parts, the first parts of the dirt on that cooler would be eliminated quite rapidly. Most of the cleaning of the cooler is to get the part that adheres closely to the elements, the surfaces of the cooler.

Q. Are you speaking of the salt water side?

A. I am speaking of primarily the oil side, but it is [1429] true to some extent on the salt water side also.

Q. Do you get scale on the salt water side of a lubricating oil cooler over a period of time?

A. Yes.

Q. Considerable scale accumulates there during circulation of salt water, does it not?

A. Yes, it can.

Q. If all of that scale and other dirt that you have spoken about that would accumulate primarily on the lubricating oil side is not removed, then what would you say as to the effectiveness of a hydrostatic test at 50 pounds pressure?

A. I want to get the question straight.

Q. Read the question, please.

(Last question read by reporter.)

(Testimony of Frank E. Blumberg.)

Mr. Hokanson: May it please the Court, while the scope of the latitude allowed in cross-examination is greater, to be sure, that in direct, this being in the nature of a hypothetical question I assume the same rules apply concerning the conditions or assumptions to be made in the question.

The Court: That is a correct assumption.

Mr. Hokanson: Therefore, I submit the question is improper for the reason that there is no evidence in this record concerning the amount of dirt or scale on [1430] this cooler, if reference is now made to the time prior to its cleaning at Winslow. There is evidence concerning the extent of the scale prior to the cleaning of the cooler at Long Beach.

Mr. Howard: Your Honor, I am asking the witness to make an assumption that there was scale on the salt water side of the cooler and dirt on the lubricating oil side, as he said would accumulate over a period of time.

The Court: Do you put it in that form?

Mr. Howard: Yes, Your Honor.

Q. If you will consider it with that assumption, as you have testified would accumulate over a period of time, make that assumption that such a condition would exist?

A. Assuming that——

The Court: Answer directly without discoursing statements.

A. Yes, scale left after the cleaning would have some effect upon the hydrostatic test for tightness.

(Testimony of Frank E. Blumberg.)

Q. Did you conclude your answer to that question?

A. My answer was that scale left in there after a cleaning process would have some effect upon the hydrostatic test.

Q. Have you seen this particular model Harrison cooler opened up in your experience with the shipyards? [1431]

A. I can't identify it by that number, although I am——

Q. In your previous examination, an assumption has been made that the gasket on the oil side would cover the soldered seams that connect the core of the cooler with the housing. Do you know whether that gasket does go over the seam or not?

A. I am quite certain the gasket does go over the seam.

Q. You are quite certain it does?

A. I am quite certain it does, yes, sir.

Q. It is on the basis of that assumption that you express the opinion that no water could leak through those seams and contaminate the lube oil, assuming that there were leaks in the seam?

A. It was on that basis that I said no water would leak through.

Q. If it were shown that the gasket did not cover that soldered seam, then would your opinion be different?

A. My opinion would be modified only slightly, that there may be a small leak through there. As

(Testimony of Frank E. Blumberg.)

I recall in my previous testimony, that was under the assumed condition of a pump capable of delivering 100 pounds pressure was connected to that line.

Q. And you are assuming leaks in the soldered seams?

A. I am assuming that there are leaks there, yes, sir. [1432]

Q. In a subsequent answer, you expressed your opinion that there was something radically wrong with the engine that would cause the galling of the gears, and you mentioned as one of the bases for that opinion that there was clogging of the oil lines to the gears, do you recall that?

A. Yes, I recall that.

Q. Would your opinion be different if it were demonstrated that an additional oil line had been hooked up to those particular gears before the breakdown?

A. That would depend upon where that additional oil line was connected. There may have been a clogging of that oil line as originally installed and then the new oil line connected at some point downstream from that clogged location.

Q. If it were shown that the new oil line were not in any way connected with the old oil line, then would your opinion be different?

A. Yes, my opinion would be different, because then it should get proper lubrication.

Q. In the same answer, you mentioned as one

(Testimony of Frank E. Blumberg.)

of the factors affecting your opinion the fact that the engine was overheated. Isn't it a fact that that overheating might have been caused by dirty and scaly heat exchangers cooling the resh water that went through the cylinder jackets?

A. While that is possible, it is more probable due to the general condition of the engine, that it was due to some [1433] maladjustment within the engine.

Q. If the heat exchangers where the salt water cools the fresh water, which in turn cools the cylinder jackets, are not functioning properly, wouldn't that be one of the first things you would look for as an explanation of the overheating of the engine?

A. That would be one of the things to look for, yes, sir.

Q. If the heat exchangers that cool the fresh water are dirty and were not efficiently operating, then that would be a likely cause and explanation of the overheating of the engine?

A. That is a possible cause of the overheating of the engine.

Q. It is one of the most likely, isn't it?

A. I would say not one of the most likely, but it is a possible cause.

Q. Now, as to these valves hitting the pistons——

The Court: The Court at this time will indulge five more minutes of examination for all of the

(Testimony of Frank E. Blumberg.)

remainder of the examination that is to be done today.

Mr. Howard: Very well, Your Honor.

Mr. Hokanson: Is that with the reservation that I have the right——

The Court: You will have to recall the witness some other day, not today. [1434]

Mr. Howard: I will waive further cross-examination of this witness.

The Court: Those connected with this case are excused until Monday morning, the 18th day of April, at 10:30 o'clock in the forenoon.

I may not be able to begin this case at that time, but I will do all I can to effect a recommencement of the proceedings in this case at that hour.

(At 12:10 o'clock p.m., Saturday, April 16, 1949, proceedings adjourned until 10:30 o'clock a.m., Monday, April 18, 1949.)

April 18, 1949, 11:15 o'clock, a.m.

Mr. Howard: I have no further questions on cross-examination of this witness.

The Court: You may proceed with the redirect examination.

Redirect Examination

By Mr. Hokanson:

Q. Mr. Blumberg, with respect to the matter of heat [1435] exchangers being the cause of the overheating of the engine, assume that a heat exchanger

(Testimony of Frank E. Blumberg.)

which is used for the purpose of cooling fresh water which is circulated in the jackets of the cylinders had certain leaks: would that, in your opinion, cause an increase in the jacket water temperature?

A. No, it could not.

Q. Why not?

A. However, that would depend upon the amount of the leak. If the salt water leaked into the fresh water, the fresh water system would have an increase in quantity and that would show up by an increase in the expansion tank, which is located on top of the engine, and if there is an appreciable amount, that expansion tank would overflow.

If the fresh water leaked into the salt water, there would be a decrease in the water in the expansion tank, and after a period of time if it wasn't observed—that is, if no one observed the expansion tank—there might be sufficient quantity leak out of the fresh water system to effect the cooling. That, however, would take considerable time and it should be detected earlier than that.

Q. Is it part of engineering procedure to ascertain the amount of fresh water you have for jacket water cooling?

A. Yes, the engineering officer on watch should observe that at frequent intervals.

Q. Assume, Mr. Blumberg, that a heat exchanger in the [1436] same condition as the lubricating oil cooler; and assume that the lubricating oil cooler had at all times maintained proper tempera-

(Testimony of Frank E. Blumberg.)

ture of the lubricating oil: in your opinion, could the condition of the heat exchangers cause an increase in the temperature of the jacket water?

A. No, it could not cause that.

Q. Can you at sea determine the condition of a heat exchanger or lubricating oil cooler?

Mr. Howard: Of the type on the Urania, counsel?

Mr. Hokanson: Yes.

The Court: Specify in your question what condition you are referring to.

Q. Is it possible through inspection to determine the existence of leaks on coolers of the Harrison type at sea?

A. Leaks can be detected in two ways. One is by a loss or a gain in the liquid passing through the cooler. That other would be—I would like to modify my answer. There would only be one way that I can think of, by a loss or gain of fluids.

Q. By opening up the exchanger, could it be determined?

A. May I ask for a clarification of the question? Are we—that is determining whether it is leaking or not?

Q. Yes.

A. Just by opening up the heat exchanger, it would be difficult to determine whether it was leaking or not. [1437]

Q. But by the application of tests could it be determined?

(Testimony of Frank E. Blumberg.)

The Court: That involves further questions as to what tests you refer to.

Q. How would an engineer determine that, if he suspected a leak in a cooler?

Mr. Howard: I object to this line of questioning as improper redirect examination.

The Court: I am inclined to think the same.

Mr. Hokanson: I have no further questions.

Recross-Examination

By Mr. Howard:

Q. Assume that your fresh water heat exchanger was scaly on the salt water side, or contained dirt or other foreign matters, wouldn't that affect the efficiency of the salt water cooling?

A. Yes, that would affect the efficiency of it.

Q. If you had a dirty and scaly cooler, that might explain the overheating of your engine, would it not?

Mr. Hokanson: I am going to object to that. There is no evidence in the record whatever of the fact that there was a dirty exchanger in this case.

The Court: It is cross-examination. The objection is overruled. [1438]

Q. Assuming that the fresh water heat exchangers were dirty or contained scale, boiler scale, would that not affect the efficiency of your heat exchanger as a cooler?

Mr. Hokanson: Same objection.

The Court: Overruled.

(Testimony of Frank E. Blumberg.)

A. It would affect the efficiency of it in this manner, that if the heat exchanger became sufficiently clogged with scale or dirt, then it would cause the engine to overheat. However, such a condition could be detected by observing the proper gauges.

Mr. Howard: I have no further questions.

Mr. Hokanson: By gauges, you mean the thermometer on the core of the heat exchanger?

The Witness: I refer principally to pressure gauges.

Mr. Hokanson: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Hokanson: Mr. Amdahl. [1439]

ALFRED AMDAHL

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your name, please?

A. Alfred Amdahl.

Q. Where do you live?

A. I live in Winslow.

Q. What is your occupation?

A. Electrician, journeyman electrician.

Q. For whom do you work?

(Testimony of Alfred Amdahl.)

A. At present, the Commercial Ship Repair at Winslow.

Q. How long have you been an electrician?

A. Since 1937.

Q. What experience have you had as an electrician? Where did you get your training?

A. I went to a trade school at Chicago, Coyne Electric in Chicago.

Q. When was that?

A. That was in the fall of 1937. I came out in the early summer in 1938, I came out of school.

Q. What did you do after completion of that training?

A. You mean what type of work?

Q. Yes.

A. I worked as a wire man in homes, wiring homes, and also installing wind chargers in the Middle West; worked out here at the Coast with a power plant on the Columbia River for about two and a half years; and down in Oregon, Hermiston, Oregon, at the ammunition depot, was there for about a year and a half; and came out here to the Coast in 1942 and went to work with the Winslow Marine Railway, and have been there most of the time since then.

Q. Were you working for the Winslow yard in the months of August, September and October, 1948? A. Yes.

Q. Do you remember the vessel Urania?

A. Yes.

(Testimony of Alfred Amdahl.)

Q. Were you aboard the vessel on her sea trial October 6, 1948? A. Yes, I was.

Q. In what capacity were you aboard?

A. I was in charge of electrical work, to see that everything fuctioned all right, or any trouble that might develop, being it was a test run.

Q. Did you observe the operation of the telemotor system? A. Yes, I did. [1441]

Q. Can you state whether it was functioning on that trial? A. Yes, it was in operation.

Q. State how it operated, without describing the system. I want to know whether it operated properly or not.

A. As far as it was brought to my attention, there was no complaints.

The Court: Do you know of anybody on board the ship that day whose business it was to see to it that it did operate properly and determine that fact? Your answer is from your standpoint accurate, but it does not give us any information. Who was on that ship that day whose business it was to see that that telemotor system was operating properly, if you know?

The Witness: Mr. Williams—I don't remember his first name.

The Court: Was it the Mr. Williams who was employed by the owner of the Urania?

The Witness: I think he was.

The Court: Did the libelants, the ship repair yard, have anybody on board, an electrician or

(Testimony of Alfred Amdahl.)

anybody else familiar with that business, whose duty it was to make that operate, if you know?

The Witness: Not as an electrician. The captain——

The Court: Obviously this witness does not know [1442] anything about the fact. If you think of something else, you should ask him that.

Mr. Hokanson: I think he misunderstands the question.

Q. What was your purpose aboard the vessel?

A. It was to observe that everything was operating properly.

Q. What phase of the telemotor system was it your function to observe?

A. The electrical end, the motor and whatever electrically was connected with it.

Q. Did you observe it? A. Yes.

Q. For how long a period?

A. Intermittently through the voyage, when we were out.

The Court: Is there anybody who observed it not intermittently but all the time, as he was supposed to do? Do you know of anyone who did it without the necessity of saying that he did it intermittently.

The Witness: No, I don't think so.

Q. You had other duties besides observing the telemotor system, is that right?

A. That is right.

Q. So far as you were concerned, it was func-

(Testimony of Alfred Amdahl.)

tioning properly? A. That is right. [1443]

Q. Had there been any trouble at any time with the telemotor on the sea trial?

A. No, there was no trouble that I recollect.

Q. Was it used at all times in the sea trial, if you know?

A. Well, not being—not standing watch over it all the time, I couldn't say, because I wasn't.

Q. You were there to be called in the event any trouble developed with any electrical part of the system? A. That is right.

Q. Were you called for any trouble?

A. No, not on the telemotor.

The Court: Were you called for any other trouble? I would be interested to know if you were called for anything that was not working right?

A. Well, I think it was kind of late when we come in. I remember we had a few things with some of the running lights, when we put them on.

The Court: Those are the outside lights on the vessel?

The Witness: Yes, sir.

The Court: Was there anything about the engine, the machinery that propels the vessel or assists in navigating the vessel, that showed up wrong and had to be corrected or tests made to see what was wrong, or [1444] anything of that sort?

The Witness: Not as I recollect.

The Court: As you recollect? Have you been on trial runs of so many vessels since the date this

(Testimony of Alfred Amdahl.)

trial run was made that you don't recall it and have them confused in your mind, is that the situation?

The Witness: No.

The Court: What you are saying does not give me any information at all. Proceed.

Q. Was there anything wrong with the ship, to your knowledge, after the trial run was completed?

A. Not as far as I know, no.

Q. Not anything within your personal knowledge? A. That is right.

Q. Was anything wrong brought to your attention from anyone else?

A. I would like to answer there that on the trial run you may have a little adjustment to do here and there; like we had salt water pumps and the pressure switches on them, sometimes they will need a little calibration or adjustment, but I couldn't say it was really trouble.

Q. In other words, the function of the trial run is to make any minor adjustments or major adjustments that appear? A. That is right.

Mr. Howard: I object to the question as leading. [1445]

The Court: Overruled.

Mr. Hokanson: I have no further questions.

(Testimony of Alfred Amdahl.)

Cross-Examination

By Mr. Howard:

Q. What was the nature of the check or operation you yourself made of the functioning of the telemotor system on the trial trip?

A. I watched the operation of the electric motor that drives, and the contactors.

Q. Where were you at the time?

A. Watching the operation.

Q. What part of the ship?

A. In the after steering—or where your quadrant is, the after end of the ship.

Q. How long were you down there during the trial?

A. I would say the time to observe it—maybe 15 or 20 minutes at a time, when I did observe those things, the operation of them.

Q. Will you go ahead now as to the nature of the check or operation you made in the after steering?

A. Like I say, it was to watch the motor when you steer, to see whether it does any sparking or functions properly that way.

Q. What did you observe at that time as to the functioning? A. It worked very good.

Q. Was the wheel being turned one way or the other at the time, or was she on a steady course?

A. No, it was not turned from left rudder to right rudder, not steady.

Q. Who was with you at this time?

(Testimony of Alfred Amdahl.)

A. That I wouldn't say. I may have been alone. There was another electrician assisting me and we covered the ship from the engineroom. Whether he was with me or I was alone I couldn't say.

Q. Did you make any adjustment whatever in the telemotor engine during the trial trip?

A. No.

Q. Or after your return from the trial trip?

A. No.

Q. Do you know of your own personal knowledge whether anyone else connected with Commercial Ship Repair made any adjustment or corrective repair to the telemotor system during the course of the trial, to your knowledge?

A. I don't think so.

Q. Or after return of the vessel from the trial trip? A. No.

Mr. Howard: No further questions.

Mr. Hokanson: No further questions. [1447]

The Court: You may step down.

(Witness excused.)

HERMAN SANWICK

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hokanson:

Q. State your full name, please.

A. Herman Sanwick.

(Testimony of Herman Sanwick.)

Q. Where do you live?

A. 1306 Queen Anne Avenue.

Q. What is your occupation?

A. Marine engineer.

Q. How long have you been a marine engineer?

A. Since 1914.

Q. What licenses do you hold?

A. Unlimited license for Diesel internal combustion engines.

Q. Since how long?

A. Since 1918, my first license.

Q. How long have you been going to sea?

A. Since that time. [1448]

Q. Would you state what your experience has been as an engineer in the past 20 years?

A. I have been operating mostly in Alaska, on sea voyages to Alaska for different companies, and since 1923 I started with the Interior Department as chief engineer for them on the Boxer, and later on the North Star. We made many voyages to Alaska, up to the North Arctic, Point Barrow and places of that kind.

In 1939, 1940 and 1941 the United States Antarctic Expedition was organized and at that time I was chief engineer on the flagship of that expedition in command of Admiral Richard E. Byrd, and in 1941 we turned the ship over to the Navy in the Boston Navy Yard.

Q. After you turned the ship over to the Navy Yard, what did you do?

(Testimony of Herman Sanwick.)

A. I came back to Seattle, and about the first of 1942, approximately January, I went to work for the Winslow Marine Shipyard. They had a contract to build 17 Navy ships for the Navy. They were Diesel powered, electric drive and so on, and I stayed with that job throughout the completion of the contract as their chief engineer as regards testing this equipment and checking all of the ships and making trial runs and shake down cruises for the Navy before those ships were accepted by the Navy, and I was on that job until the last part of 1945. [1449]

Q. How many Diesel Navy vessels did you test during that period? A. 17.

Q. What are you doing at the present time?

A. At the present time I am working for the Commercial Ship Repair. They have a contract to convert and build a new fireboat for the city of Seattle, and I am in charge of that job for the Commercial Ship Repair as regards to construction and machinery installation, and later on the trials and tests of that ship.

Q. What type of vessel is that?

A. It is a Diesel powered, electric drive ship, approximately 3000 horsepower, with the three different engines that are going to be installed in this ship.

Q. You were not working at Winslow during August, September and October of 1948, were you?

(Testimony of Herman Sanwick.)

A. No, I was not.

Q. When did you first go over there?

A. February 1, 1949.

The Court: Where did you go and what did you begin to do at that time?

The Witness: I went to work in charge of this fireboat for the Commercial Ship Repair.

The Court: Do you mean the Duwamish?

The Witness: The Duwamish, yes, sir. [1450]

Q. In the course of your experience as a Diesel engineer, have you had occasion to test heat exchangers or coolers?

A. Yes, I have, a number of times.

Mr. Howard: At this time I would like to enter an objection to any interrogation of this witness as an expert witness on the ground that he has testified he was formerly employed for a period of several years by the Commercial Ship Repair and is now employed by the Commercial Ship Repair, and he has also testified that he was not employed by the Commercial Ship Repair in the months in which the Tanker Urania was in their yard; hence I submit to Your Honor that he is an employee of a party to this cause, not having any direct personal knowledge of the conditions of this ship, that he would hardly qualify as an expert witness because of the obvious bias that he would have by reason of his past employment and present employment.

The Court: Did you consider that in connection with the authorities, as to whether or not under the

(Testimony of Herman Sanwick.)

authorities it is competent to call such a witness as an expert?

Mr. Hokanson: May it please Your Honor, Mr. Howard has inadvertently misstated this witness' history when he said he was formerly employed by Commercial Ship Repair. [1451]

The Court: It was the Winslow Marine Company?

Mr. Howard: I beg your pardon, I should have said the Winslow Marine.

Mr. Hokanson: Which is the predecessor in interest of the present company, Your Honor, and had no connection here. With respect to the objection Mr. Howard makes, an expert is an expert irrespective of his employment. Obviously, any expert witness is called by one party or the other; to that extent, his bias or prejudice is a matter for the Court to determine.

The Court: Do you have any law?

Mr. Hokanson: I have no authorities in answer to it, but I would submit there is no rule of law, to my knowledge, which would prohibit a man from testifying as an expert merely because he is employed by a party to the action.

The Court: Does either side have any law, in your trial brief or otherwise?

Mr. Howard: I haven't, Your Honor.

Mr. Hokanson: No, Your Honor.

The Court: The objection is overruled.

Q. Do you recall the last question?

(Testimony of Herman Sanwick.)

A. Yes.

Q. In that connection, can you state what the practice is with respect to the pressure test to be applied in testing [1452] a heat exchanger in shipyards? What factors are taken into account in determining the amount of pressure?

Mr. Howard: Are you asking the question generally or as to any particular type of heat exchangers?

Mr. Hokanson: I am asking it generally about heat exchangers.

A. The pressure required would be two times the working pressure, whatever that heat exchanger was used for. That is on the new installation. On a used installation, after it has been in operation, Coast Guard inspection is one and a half times that working pressure.

Q. You have reference to the highest working pressure of a unit? A. Yes.

Q. Assuming that a heat exchanger, a used heat exchanger or cooler, has a working pressure of 18 pounds on the lubricating oil side and 7 pounds on the salt water side: what in your opinion would be an adequate hydrostatic test?

A. Two times 18.

Q. Would 50 pounds hydrostatic test be an adequate test, in your opinion?

A. Yes, it would.

Q. In your experience with marine vessels, can you state whether it is possible for leaks to develop

(Testimony of Herman Sanwick.)

in [1453] soldered seams of heat exchangers on a voyage? A. That is possible.

Q. What might cause it?

A. That would be hard to state. It might be a defect in the solder, and break loose.

Q. Would vibration have any effect on it?

A. I could.

Q. Assume that a 560 horsepower six cylinder Diesel engine, a vessel powered by such an engine, leaves Puget Sound on October 15 and according to its log travels a period of ten days down the Coast approximately 2000 miles; and that during that period its operation is normal and efficient; and that on the 10th day of its voyage the lubricating oil is changed; assume that on the following day the lower helical timing gears of that Diesel engine become galled; assume further that such a vessel when it started out had leaks in its lubricating oil cooler; assume further that the pressure on that cooler was 18 pounds on the oil side, 7 pounds on the water side; assume further that no auxiliary pumps of any kind were used during that voyage: do you have an opinion as to whether that galling could be caused by lubricating oil contaminated by sea water?

The Court: The answer should be yes or no.

The Witness: I have an opinion, yes. [1454]

Q. What is your opinion?

A. My opinion would be that if the oil were contaminated with sea water or dirt, that before the

(Testimony of Herman Sanwick.)

galling of these gears happened there would be trouble showing up in your crank bearings, journal bearings and other working parts of the engine before the timing gears were damaged to the extent that they were galled.

Q. Assume that there was no damage to those other bearings: would it be possible, in your opinion, for the galling to be caused by the contamination of the oil by sea water? A. No.

Q. Why not?

A. For the reason that no other part of the engine—as I said, crank bearings and journals and those working parts would give you trouble and show up trouble before timing gears would show up trouble because of contamination in the oil.

The Court: What is it that causes you to think that those would be damaged first?

The Witness: For the reason that crank bearings work under your oil pressure. They are a friction bearing and they are the ones that are driving that crankshaft around and delivering the power to the crankshaft, and the minute oil becomes contaminated to [1455] any degree, the lubricating quality in that oil is broken down, and when that lubricating quality is broken down, the film between the crank bearing itself and the steel crankshaft—the two come in direct contact, and when they come in direct contact, they build up frictional heat to such an extent that you would certainly, or very shortly, burn your crank bearing out.

(Testimony of Herman Sanwick.)

The Court: So far as anything you have said, you might have the same condition in the gears. Perhaps you would not, but so far as anything you have said up to this time, you might also have the same situation in the helical gears.

Q. Assume that the helical gears are lubricated by the same oil—I assume you included that in your answer? A. Yes.

Q. And assume further that during this period the temperature of the lubricating oil remained relatively constant; assume further that prior to the galling of the helical timing gears the main bearing temperature did not vary, did not exceed 100° and varied between 90° and 100°: what further observation do you have, if you have an observation to make, with respect to the cause of the galling of those gears?

A. The only comment I could make on that would be a possible mechanical defect that would start that condition [1456] to develop.

Q. Of what character?

A. Possibly a broken tooth or something on that order which would get between the two revolving gears, and that in turn naturally would force the gears apart and possibly bend your vertical shaft or something on that order, and if they were then out of line, of course they would continue to gall and eventually be considerably galled.

The Court: Does either the witness or counsel

(Testimony of Herman Sanwick.)

appreciate that the record does not yet have a response to the Court's last remark?

Mr. Hokanson: Yes, Your Honor.

Q. What happens to lubricating oil with respect to its temperature in a Diesel engine when it becomes contaminated by sea water?

A. If oil becomes contaminated with sea water to any degree, the lubricating qualities of that oil would not be perfect; therefore the engine working parts would build up a certain amount of additional heat and that in turn would heat the lubricating oil because the lubricating oil picks that heat up—in other words, the oil temperature would rise.

Q. If, in the supposititious case that I have stated, you do not have an abnormal temperature on your main bearings according to the log, what does that indicate with respect to the quality of the lubricating oil? [1457]

A. That would indicate the oil was in good lubricating condition.

Q. Could it remain at normal temperature if the lubricating oil had lost its viscosity to the extent that it would gall the timing gears?

A. I do not think so.

The Court: Since counsel has not asked him, I would like to ask him to state again, if you know, the reason why in your theory of the case the main engine bearings would become damaged before the helical gears, if the cause of damage was contamination of the lubricating oil? What you have said

(Testimony of Herman Sanwick.)

discusses a situation with respect to the main bearings, but it does not relate it to the situation of the helical gears.

The Witness: To that I would say that a Diesel engine is so designed that where you have a circulating oil system on an engine that lubricates the entire engine, this lubricating oil going to the crank bearings and the journal bearings would be one of the first sources of trouble, because they are definitely the heaviest working part of that engine; and the timing gears, even though the oil might be slightly contaminated with water, the damage would not indicate there as fast as it would on the crank bearings.

The Court: For what reason? [1458]

The Witness: For the reason that on a crank bearing or a journal bearing you must have practically perfect lubricating oil going through those bearings to keep them from getting hot and burning the babbitt out of those bearings. Babbitt is quite soft.

Q. Assume that the helical timing gears are made of case-hardened steel: does that have any bearing upon your answer to the Court's question?

A. Not necessarily.

The Court: Suppose they were made out of babbitt, or some other soft material: would you expect them to be more likely to be damaged in the same amount as the babbitt in the main bearings?

The Witness: That is difficult to answer, because gears are not made of that type of material.

(Testimony of Herman Sanwick.)

The Court: An expert witness is supposed to be capable of considering any question that is submitted to him. Are you or are you not capable of considering this question?

The Witness: If they were soft the same as the bearings were, yes, then they would be damaged.

Q. The helical gear carries what load on a Diesel engine?

A. They drive the upper camshaft; that has to do with the timing of the valves of the engine, and also the [1459] governor is tied in on that drive.

Q. In terms of comparative load, what is the load of these gears as compared to the main and crank bearings?

A. That would be a mathematical figure which I couldn't quite answer.

Q. Which is the greater?

A. I would say the greater load is on the individual crank bearing.

Q. Could you give us any rough figure in terms of how many times greater?

A. We will say a 500 horsepower engine, one crank bearing—if there were five cyliners, we will say—would be carrying a load of 100 horsepower; but the timing gears on that engine would not require 100 horsepower to drive that upper camshaft. In other words, figure that in a percentage of horsepower used in the engine to drive the auxiliary equipment on that engine—in other words, it is a

(Testimony of Herman Sanwick.)

difference between indicated horsepower and shaft horsepower.

Q. Does a Diesel engine take on any water through its oil system during the course of normal operations?

A. Not necessarily, only what might be brought in through the engine through air that the engine draws into it, and there is naturally a certain amount of moisture in air that you draw into an engine—condensation, in other words. [1460]

Q. What happens to that water?

A. If there is any great amount of that water you pick that up in your provisions provided on that engine to remove water from oil; like your settling tank and your filters and strainers, and so on, and you have three or four different ways of drawing that water off the lubricating system.

Q. In your opinion, could lubricating oil be contaminated to such an extent as to cause the galling of the helical timing gears by the dropping of fresh water down the inside of one cylinder at the rate of ten drops per minute, assuming you have a lubricating oil capacity of 70 or 80 gallons, in a period of ten days?

A. No, that wouldn't bother it, not that small amount.

Q. Having answered no for ten days, your answer would be the same with respect to a period of 36 hours? A. Yes.

Q. And any lesser period? A. Yes.

(Testimony of Herman Sanwick.)

Q. Can you tell whether oil is contaminated by the color of it?

A. Well, yes, you can tell whether oil is contaminated by the color of it if you know the color of the oil you put in there originally.

Q. If oil were proven to be brown in color, would that [1461] necessarily show that it was contaminated?

A. As I say, I couldn't say. I don't know what color oil they put in there originally.

Q. Assuming that it was a different color, would the color brown indicate contamination?

Mr. Howard: I object to that. There is no evidence in the record upon which such an assumption could be based.

The Court: As to brown color?

Mr. Howard: There is testimony that the oil was found to be of a brown color after it had been removed, but there is no basis for an assumption that it was another color when it went into the system, if the Court please.

The Court: I understood Mr. Hokanson to indicate brown as the color when he used the term "other color." Perhaps I am wrong. The objection is sustained because of uncertainty as to the form of the question.

Q. Assuming that a conclusion is drawn that lubricating oil is contaminated by sea water because it appears brown in color, is it possible, in your

(Testimony of Herman Sanwick.)

opinion, to determine the source of contamination by looking at the color of the oil?

Mr. Howard: I object to that. He has already testified he would have to know the color of the oil [1462] when it went into the engine. I object to it as being repetitious.

The Court: The objection is sustained, not because it is repetitious, but because I think all of the necessary conditions are not stated.

Q. Can you tell by color of oil the source of contamination, if it proves to be contaminated?

A. Not an accurate cause. You would have to analyze it.

Q. You mean chemically?

A. By a laboratory that does that kind of work.

The Court: At this point we will take the noon recess until 1:30 this afternoon.

(At 12:03 o'clock p.m., Monday, April 18, 1949, proceedings recessed until 1:30 o'clock p.m., Monday, April 18, 1949.)

April 18, 1949, 1:30 o'clock p.m.

The Court: You may proceed.

Q. Assume that you have a lubricating oil cooler attached to a Diesel engine, with an operating pressure of 18 pounds on the oil side and an operating pressure of 7 pounds on the salt water side; assume further that there are leaks in the cooler: is it

(Testimony of Herman Sanwick.)

possible to get salt water into the oil under those circumstances? A. No.

Q. Why not?

A. Because the pressure of the oil being 18 pounds and the pressure of the water being 7 pounds, the greater pressure would enter into the lower pressure.

Q. How is the pressure maintained on oil coolers in Diesel engines?

A. They are maintained by two pumps; one that takes care of the lubricating oil pressure and the other one that drives the salt water circulating pressure.

Q. In other words, a static pressure is maintained in the cooler?

A. A pressure—when you say static, I don't quite understand how you mean static.

Q. As opposed to dynamic, a constant pressure?

A. Yes, a constant pressure.

Q. What happens if you have leaks in your oil when the oil pressure is higher than the water pressure? A. What happens?

Q. If there are leaks in the cooler and the oil is at 18 pounds and the water is at 7?

A. The oil would enter into the water side, or the lower pressure, and the oil in your circulating system would decrease in quantity and that would be noted on the gauge glass on the system tanks, the sump tank or day tank, as you might call it.

(Testimony of Herman Sanwick.)

Q. What happens to the oil that goes into the water?

A. It goes into the sea water and overboard into the ocean.

Cross-Examination

By Mr. Howard:

Q. Mr. Sanwick, you expressed the opinion that where leaks were found in the lubricating oil cooler, they might be due to defects in the solder, or vibration. Defects in the solder might exist prior to the commencement of the voyage, isn't that true?

A. If there are defects, it could be at that time, yes.

Q. If the heat exchanger was only subjected to a test pressure of let's say 50 pounds, such defects might not be disclosed in the hydrostatic test, isn't that true? A. That is possible, yes.

Q. Whereas, if they are subjected to a higher pressure on the hydrostatic tests, the defects in the solder might then be discovered, isn't that true?

A. That is true. [1465]

Q. You mentioned as another possible cause the vibration. If you assume that the engine was operating normally during the period of ten days of this sea voyage prior to the first breakdown, there would be no cause to expect any excessive vibration, would there?

A. I never made a statement "excessive vibration." I said working vibration of the engine.

(Testimony of Herman Sanwick.)

Q. Would you expect the leaks to develop in the seams of the solder from normal vibration of the engine? A. Not necessarily, no.

Q. In other words, it would be excessive vibration that you had reference to, isn't that correct?

A. Yes, it could be excessive.

Q. The opinion that you expressed on the breakdown after a period of ten days' operation of the main engine, and leaks in the cooler existing at the commencement of the voyage—did you take into consideration there the possibility that the contamination of the lubricating oil might be progressive during that period of time?

A. I don't quite get that question.

Q. Did you hear the question?

A. Not completely.

Q. Read the question, please.

(Last question read by reporter.) [1466]

A. Yes, it could be progressive contamination of the oil.

Q. In other words, your oil might be in fairly good condition for a few days and then it might progressively become more contaminated, isn't that true?

A. It could be contaminated, but if that condition existed, it would be noted by the engineer on watch.

Q. How, please?

A. By different reasons. These engines are provided with a strainer coming out of the engine going

(Testimony of Herman Sanwick.)

into the pump. That is one place you have of checking the oil coming out of the engine to see if there is any water or dirt—that is what it is put there for.

From that pump, it goes to the day tank or the sump tank. That has a settling area in the bottom of the tank. Dirt and water naturally will settle from oil and go to the bottom. You can take samples from that, which an engineer does in his regular rounds, to see if there is any water or dirt showing up. From there on you go through a further strainer going back into the engine, where you can pick up any dirt or water, which the engineer checks on his regular rounds.

Q. In making those last statements, did you have in mind the engine on the Tanker Urania?

A. I have in mind a Diesel engine on any ship.

Q. Have you ever seen the engine on the Tanker Urania? A. No, not the engine.

Q. Then you don't know whether it has the type of filter or the type of day tank that you have just referred to?

A. I do not know that specific engine other than the factory prints of it.

Q. When you are speaking about the friction and heat being generated in your various types of bearings or gears, do you recall the statements you made concerning that? A. Yes.

Q. I would like to ask you what type of a contact you have in a helical gear?

(Testimony of Herman Sanwick.)

A. Tooth to tooth.

Q. What kind of a contact do you have in a bearing? A. Bearing to crankshaft.

Q. In other words, it is a smooth contact, is it not, over a fairly large surface?

A. It is a smooth surface, yes.

Q. On a helical gear it is a point to point contact, isn't it?

A. Not a point to point, the side of the tooth.

Q. What is your opinion as to the relative pressure or strain borne by a helical gear as compared to a bearing?

A. As I said before, that is a mathematical question that is hard for me to answer exactly.

Q. Have you ever made any research to determine the relative strain or pressure borne by a helical gear as compared to a bearing?

A. In my experience, I do know that a crank bearing, for instance—you have the top half of this crank bearing, that one surface is always working on that crankshaft, is doing the labor; but on a gear first one tooth takes the load, then the following tooth takes the load, until it makes a complete revolution and then it comes to that tooth again, so that tooth is not taking the load continuous the same as a crank bearing is taking the load continuous in exactly the same area.

Q. Isn't it true, though, that in a helical gear or set of helical gears there is more opportunity for grinding than there is in a bearing—in other words,

(Testimony of Herman Sanwick.)

you have an additional frictional factor to consider, do you not?

A. I don't see how you could with perfect lubrication. Assuming equal conditions of lubricating between the helical type gear and the bearing that you have described, isn't it true that with the teeth in the helical gear there is the additional factor of grinding, or additional factor of friction involved?

A. No, I don't think there is, for the reason that a helical gear has a sliding motion, and those teeth are highly [1469] polished and they have their oil film between them when they are working.

Q. But it is true that there is a point to point contact, so to speak?

A. Any mechanical working part has a source of friction if there is no lubrication there.

Q. You mentioned that in your opinion the dropping of fresh water down the side of the cylinder liners at the rate of ten drops per minute over a period of ten days would not, in your opinion, be an explanation of the cause of the galling of the helical gears? A. No.

Q. Assume that that same condition existed along with some contamination of your lubricating oil in the cooler through salt water leaks, would you then say that the dropping of fresh water might be a contributing cause of the breakdown? A. No.

Q. Why not?

A. For the reason that fresh water—you would have to have a large amount of fresh water to

(Testimony of Herman Sanwick.)

break your oil down. A small amount of fresh water going into lubricating oil has a tendency to evaporate and go into sort of a light vapor, and so on, and it more or less evaporates out of the oil; and water has no foreign element in it that is destructive—in other words, it is clean and pure. [1470]

Q. But once again, if the fresh water was contaminating the lubricating oil along with contamination from the salt water side of the heat exchangers, couldn't those two conditions together furnish an explanation of the galling of the helical timing gears?

A. Not in my opinion, it wouldn't.

Q. Can you amplify that, please?

A. You say the oil is contaminated. Well, in the first place, if the oil is contaminated you don't run the engine; you do something about it. You remedy or find out where this contamination is coming from.

Q. Let's assume that they did not and could not determine the contamination of the lubricating oil —what I am interested in finding out is your opinion as to whether the contamination of the oil could explain the galling of the helical timing gears?

A. If oil is contaminated to a degree where this oil is broken down and ruined, yes, gears will gall or bearings will burn out, and so on, but I maintain that those difficulties would be experienced in your crank bearings and journals before it would be experienced in your timing gears; for the reason that in a Diesel engine, they are designed so that

(Testimony of Herman Sanwick.)

if you do have contaminated oil, you possibly burn out a crank bearing. A crank bearing can be changed by the engineer in a short period of time, but if you were to [1471] damage your timing years, why, it would take several hours to change a set of timing gears, and therefore timing gears in an engine are generally so designed that they will be one of the last things to be damaged due to contaminated oil.

Q. Have you ever seen helical timing gears on a marine Diesel engine that were galled?

A. Yes, I have seen them where you might call it galled, that is, where they have been worn. I have seen that, yes.

Q. How frequently?

A. Well, not recently, no. You said how frequently?

Q. Yes.

A. I imagine in my experience two or three different times, at the most.

Q. Did you then determine what the cause of the galling was?

A. These were generally of the older type engines where the timing gears were open and subject to dirt or foreign matters getting into those timing gears from the outside area; and on some of them there would be a broken gear or something of that order that would start this condition, this galling, like chipping a gear.

Mr. Howard: I have no further questions.

(Testimony of Herman Sanwick.)

Redirect Examination

By Mr. Hokanson: [1472]

Q. In answering Mr. Howard's question about the solder in the cooler, isn't it true that the condition or age of the solder might have something to do with how quickly it might fracture or come apart in the process of operation?

A. The age of it would have something to do with it, yes, on any soldered joint.

Q. Depending upon that, you could not predict accurately when it would happen under operating conditions?

A. No, you couldn't determine when——

Mr. Howard: Objected to as leading.

The Court: Sustained.

Mr. Hokanson: I have no further questions.

Mr. Howard: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Hokanson: Your Honor, at this time cross respondents would like to read into evidence the deposition of Mr. Frank H. Gallagher.

The Court: You may proceed to do that.

Mr. Hokanson: We will now read his deposition.

(Mr. Waddoups appearing for libelants-cross respondents; Mr. Collins appearing for claimant-cross libelant.) [1473]

DEPOSITION OF FRANK H. GALLAGHER

"Direct Examination

By Mr. Waddoups:

Q. Mr. Gallagher, will you state your full name, please. A. Frank H. Gallagher.

Q. And what is your business or occupation?

A. Marine Surveyor to the American Bureau of Shipping.

Q. And where is your present office?

A. In Honolulu. Home office in New York.

Q. And, Mr. Gallagher, how long have you been associated with the American Shipping Bureau?

A. Seven and one-half years, as a surveyor.

Q. And will you give us a little background as to your experience as such surveyor?

A. Well, I am a professional registered engineer of the State of Washington. I hold a chief engineer's license, steam and Diesel, unlimited.

Q. What have been the various posts in which you have served with the American Shipping Bureau?

(Deposition of Frank H. Gallagher.)

A. New York, on the Great Lakes; Seattle; Portland, and, of course, in Honolulu now.

Q. Mr. Gallagher, are you familiar with a vessel known as the M. T. "Urania"? A. I am.

Q. Are you also familiar, or do you know anything about a firm which goes under the name and style of Commercial Ship [1474] Repair?

A. I do.

Q. Have you had occasion to perform any duties with relation to the M. T. "Urania" in your capacity as a representative of the American Bureau of Shipping?

A. Yes, we carried out work, and a special survey and repairs and conversion on that vessel.

Q. Do you recall when this work was done?

A. Yes.

Q. And where, please?

A. I attended that vessel on August the 16th 1948 when the vessel was over at the Commercial Ship Repair plant, at Winslow, Washington, and my last date of attendance was October the 9th, 1948.

Q. Do you have in your possession a report or a signed copy of a report which was made and filed by you as a result of your inspection of this vessel?

A. Yes, I have a carbon; signed copy.

Q. May I see it, please.

A. (Witness shows a document to counsel.)

Q. Now, Mr. Gallagher, calling your attention to a document consisting of seven pages which you

(Deposition of Frank H. Gallagher.)

have just handed me, and to which is appended a document dated October 9, 1948, entitled "Survey report, bearings repair; number 3058. Copy", and I call your attention to the signature which [1475] appears on the last page of the document mentioned, and ask you if that is your signature.

A. That is my signature.

Q. Mr. Gallagher, have you had an opportunity in recent days to examine this report?

A. No, I have not.

Q. Will you examine it and state for the record whether or not that is your own report.

A. Well, this report has been in my possession since the time I received it in Portland, on or about February the 20th, and at that time I did read the report, and I am quite certain that it is unaltered in every respect.

Mr. Collins: Did you intend to introduce this in evidence at this time?

Mr. Waddoups: Yes.

Q. Mr. Gallagher, are you, under the rules of your office, permitted to surrender possession of that report? A. No, unfortunately I am not.

Q. You would be unable, then, to put that report into the file as a part of this record?

A. We are requested to make a survey on a vessel by the owners, and it is the policy of the Bureau to furnish the reports to the owners and not to release the report to anyone else. However, the releasing of such a report I believe would come under the

(Deposition of Frank H. Gallagher.)

direction of our chief surveyor in [1476] New York."

Mr. Hokanson: Your Honor at this point it is apparently stipulated that the copy of the report which the witness testified he had signed could be introduced as an exhibit for identification, provided the matter was compared at a later date and proved to be the same, and counsel for the cross libelant agrees.

"Q. Now, Mr. Gallagher, are you prepared to state at this time the extent of your inspection of this vessel? A. I am.

Q. Will you please so state.

A. The owner's representative, Mr. Harry Williams, representing the Compania Naviera Limitada, requested this Bureau to examine and report upon the dry-docking, the drawing of the tailshaft; repairs and alterations, the annual boiler survey; the carrying out of special periodical survey number 1, on the hull, machinery and electrical apparatus, and also to carry out the annual classification survey and international load line survey. That was the purpose of our attendance.

Q. And what were the examinations and inspections made by [1477] you on the occasion that you did inspect the "Urania", please?

(Deposition of Frank H. Gallagher.)

A. We found, as far as the exterior hull is concerned——(interrupted)

Mr. Collins: May I interrupt. You used the word "we". Do you mean by that someone other than yourself?

A. By "we", I believe, being that I am part of, and a representative of a society, I feel I am entitled to use the term "we".

Mr. Collins: I will postpone my questioning.

Q. Did you, however, personally make this inspection?

A. Definitely. So, perhaps it goes back to an "I".

Q. Will you continue, please.

A. I found the exterior condition of the hull to be satisfactory. However, there were some slight repairs which were nothing out of the ordinary. At that time alterations in the vessel's structure were carried out to suit the requirements of the new owner, and his specifications.

Q. And where did you receive those requirements, and those specifications?

A. They were presented to us by the owner's representative and of course the contract around those specifications was made between the company, that is the owner, and the Commercial Ship Repair, and upon completion of the alterations to the various portions of the vessel why we examined the alterations which we were concerned with and found that the [1478] alterations had been effected in a satisfactory manner."

(Deposition of Frank H. Gallagher.)

Mr. Howard: I move to strike the last part of that paragraph as not responsive, and also the next paragraph of the answer as not responsive to the question.

The Court: Beginning, "Now, when I spoke of the hull"?

Mr. Howard: That is correct.

The Court: I think it is an explanation of the extent of the hull's inspection.

Mr. Howard: The question is, "Where did you receive those"——

The Court: It will be stricken.

Mr. Hokanson: Starting at what point?

The Court: On page 8, the first answer, the second paragraph, "Now, when I spoke of the hull".

Mr. Hokanson: I agree that second paragraph may be stricken.

The Court: That second paragraph, consisting of four lines, beginning where I have stated, is stricken.

"Q. Now what other inspection was made of this vessel?

A. Do you want to go into other portions of the special [1479] survey?

Q. Yes, sir.

A. Do you mean in relation to machinery?

Q. Yes, Mr. Gallagher, if you will, please.

A. Well, prior to my attendance, the Bureau

(Deposition of Frank H. Gallagher.)

carried out a preliminary survey of the main engine."

Mr. Howard: I will waive the objection.

"Q. Now, Mr. Gallagher, when you say the Bureau made a preliminary survey, did you have anything to do with that personally?

A. Personally I did not, but I was furnished a report, as is customary, because it is part of our function to keep a past record of a vessel; when we attend a vessel we know the past history as far as its general condition of the classification survey is concerned, and at the time that I attended the vessel I had a copy of Seattle report number 2638, dated 2/5/48, which stated that the cylinders of the main engine were fractured.

Mr. Collins: Again I interpose a running objection to any reference to this survey.

Q. Do you have a copy of that report which you have just [1480] mentioned? A. I do not.

Q. Where would that be located?

A. In our Seattle office.

Q. After this preliminary survey what further steps did you take, Mr. Gallagher?"

Mr. Howard: This next answer I move to strike first on the ground it contains a hearsay statement;

(Deposition of Frank H. Gallagher.)

second, it is not responsive to the question asked.

Mr. Hokanson: I have no objection.

The Court: It will be stricken, down to the next question on page 11, and further if counsel agree. If they have a different arrangement, state what the arrangement may be.

Mr. Hokanson: Does your objection go to the question beginning at the top of page 11?

Mr. Howard: Yes, it would, being a hearsay statement not within the knowledge of the witness.

The Court: If the witness were on the stand and the same objection were made, the Court would feel it should be overruled. You can call to the attention of the witness some matter, even if it is a hearsay matter, and then ask him what if anything he did.

Mr. Howard: I will waive the objection.

"Q. As a result of your reading this Seattle report which you referred to, Mr. Gallagher, what steps, if you know, were taken to effect repairs to this vessel?

A. The owners purchased new equipment to replace that which was fractured.

Q. And was that equipment installed?

A. It was installed, indeed.

Q. And upon your inspection, what condition did you find the installed equipment to be in?

A. To the best of my knowledge it was new; the replacements were new.

(Deposition of Frank H. Gallagher.)

Q. Would you say they were in good condition?

A. Indeed they were, yes.

Q. And as a result of your review of this report, or of your examination, just what further steps were taken by you to inspect the ship, and please relate in specific detail the portions of the vessel which were affected?

A. The main engine was completely dismantled, and the crankshaft was raised. An examination was made of the engine frame, the tie rods, the crankshaft, the fuel pumps, liners, pistons, connecting rods; wrist-pin and connecting rod and shaft; thrust bearings; all of which were found to be in a satisfactory [1482] condition. The intake and exhaust valves were ground in, and piston rings renewed. And the attached cooling pumps were found in good condition. That, in brief, takes in the main engine.

Q. What other alterations, if you know, were effected, and will you state from your inspection what the result of those repairs was?

A. Well, the two 40 K.W. 6-cylinder Diesel-driven generators were completely dismantled, and the crankshafts removed; the crankshafts, engine frames, pistons, connecting rods, fuel pump, cams, valves, motion linkage thereto, were examined and were found to be in satisfactory condition. The piston rings were renewed and the valves were ground in, and except as further noted, were found to be in satisfactory condition.

(Deposition of Frank H. Gallagher.)

Q. Now are the facts to which you are now testifying substantially contained in the report number 3058 to which reference has been made earlier?

A. No.

Q. You are testifying now to matters other than are contained in that report, is that correct?

A. That is correct. The crankshaft of the starboard combination generator and cargo pump was found fractured. The shaft was renewed.

Q. What further repairs and inspections were made? [1483]

A. The cylinder block of the port generator was found fractured, and that block was renewed. The two gear-driven cargo pumps within the pump room were opened, examined, and were found in good condition, and the fire, bilge and sanitary pumps were found to be in good condition. We examined the compressors and found them to be in order. The air reservoirs were found in likewise good condition. The lube oil coolers and the inter-cooler were examined and found to be in satisfactory condition. The anchor windlass was turned and examined and found in satisfactory condition. The steering engine was examined and found to operate satisfactorily, and upon recommendation a relieving tackle was furnished, and upon completion of all our recommendations for repairs a sea trial was held, during which time I observed the operation of the main engine and all the accessories thereto, and other than recommending the re-timing of the engine, I found

(Deposition of Frank H. Gallagher.)

the equipment to be quite in order and satisfactory.

Q. Do you recall whether or not the recommended re-timing was done? A. It was.

Q. What further repairs and inspection were made, please?

A. The electrical work. The motors were overhauled; renewals carried out as found necessary, such as brushes and bearings, and during the sea trial period such operation [1484] was found to be good. In addition to that, insulation resistance values were taken on circuits, and the noted readings on such circuits were found to be of acceptable values. And the heating boiler was hydrostatically tested, and the newly installed nested tube tank was found tight, and the electric controls, relays and resistors for the operation of the heating boiler were found in good condition, and to function satisfactorily.

Q. Was any further inspection made, that you recall, or any further repairs and inspection made, Mr. Gallagher?

A. Yes, there was. Plugs and canvas boots were furnished for the ventilators, and the exhauster duct leading to the pump room was revised, at our request, because we found—that is, I found, the duct thickness to be below that which is required.

Q. Was this deficiency cured by the repairs?

A. Yes, it was.

Q. Were there any further repairs and inspection made?

(Deposition of Frank H. Gallagher.)

A. No, I believe that takes in the general aspect of the survey.

Q. Now, Mr. Gallagher, are you familiar with the ammunition bulkhead that was on the vessel at that time, prior to its removal, or about the result that was effected by the removal of the ammunition bulkhead?

A. No, I am not familiar. However, I can connect the location. [1485]

Q. From your experience and training, as an expert in this field, Mr. Gallagher——(interrupted)

A. I don't believe I wish to be called an expert.

Q. Well, let me put the question differently. At least from your training and experience, and as the result of your inspection, did you form any conclusion as to whether or not the removal of the ammunition bulkhead had affected the strenght or seaworthiness of the vessel?

Mr. Collins: I object to that question as a hypothetical question, and as being put on the basis of the witness being an expert, an expert witness, and he has not been qualified as such, and he disavowed being an expert."

Mr. Howard: I renew the objection.

Mr. Hokanson: I submit this witness' qualifications are such as to qualify him as an expert. Out of modesty, he himself asked that he not be designated as an expert.

(Deposition of Frank H. Gallagher.)

The Court: The objection is overruled.

"Q. Will you answer the question, now. The Court later will rule on that.

A. Well, that bulkhead, if it is the bulkhead which is above the free-board deck, is what I consider a subdivision [1486] bulkhead, and does not serve as a water-tight member of division.

Q. Getting back to the question as asked, and which has been objected to, and the record may show the objection is preserved to this further question, too: In your opinion did the removal of that bulkhead affect the strength or seaworthiness of the vessel?

Mr. Collins: I further object to that question on the basis that the witness has indicated that he has not definitely placed the bulkhead as being above or below the free-board deck.

Q. Well, then, if it is the one that was above the free-board deck, what is your opinion as to its effect, on the sea-worthiness of the vessel?

A. In my opinion if that bulkhead referred to is located above the freeboard deck it would have no effect on the sea-worthiness of the vessel.

Mr. Collins: We will reserve the same objection to the question and answer as previously made, on the basis of the hypothetical question.

Q. Now are you familiar with any telemotor repairs that were made on this vessel at Port

(Deposition of Frank H. Gallagher.)

Angeles, Washington? A. No, I am not.

Q. Do you recall when the vessel was taken on a sea trial? A. I do. [1487]

Q. When you were present?

A. Indeed I was.

Q. When was that? Could you give us the approximate date, or the exact date, if you can?

A. At the moment I cannot furnish the exact date, because I do not have my notes on the daily recordings with me, but I would say that such trial was carried out about the 6th of October.

Q. Could it have been on the 8th of October?

A. It could have.

Q. And do you recall whether or not an inspection was made of the telemotor at that time?

A. Yes, the steering equipment was examined during the trials of the vessel.

Q. Did you at that time find any evidence of air locking or a tendency to oscillate in the system?

A. No, to the best of my knowledge there was no difficulty experienced with the rudder or the steering equipment.

Q. Was there anything to indicate to you, from your inspection, the existence of a worn or broken wire in the telemotor system?

A. No, none whatsoever.

Q. I think you have already stated that certain recommendations were made by you with respect to the steering apparatus. A. That's right.

Q. And reference is made to that in your report?

(Deposition of Frank H. Gallagher.)

A. That's right.

Q. And were the recommendations carried out?

A. They were.

Q. Now your report makes reference to relieving tackle. Did the relieving tackle have anything to do with the operation of the telemotor? A. No.

Q. What purpose did it serve?

A. The relieving tackle is put in to ease the effect on a rudder, when the sea is coming up against the opposed area of the rudder, and as the rudder swings back the relieving tackle will tend to ease the rudder in its direction.

Mr. Waddoups: I understand, Mr. Gallagher, you are obliged to leave at this time to go to a ship?

Mr. Gallagher: Yes.

Mr. Waddoups: When can you return and complete this deposition?

Mr. Gallagher: Possibly tomorrow morning. I will have to find out from the company.

Mr. Waddoups: Suppose we put it on the basis of tomorrow morning, and after you have contacted your people you can let us know if it is not possible for you to meet here. We will meet here at 8 o'clock tomorrow morning, and if it is to the contrary we will hear from you this afternoon. [1489]

Mr. Collins: That is satisfactory.

(Whereupon, at 1:55 o'clock p.m., the taking of the deposition was adjourned, subject to confirmation, at 8 o'clock a.m., Saturday, March 19, 1949.)

(Deposition of Frank H. Gallagher.)

(At 8 a.m., Saturday, March 19, 1949, the further taking of this deposition was postponed until Saturday, March 26, 1948, at 8 o'clock a.m.)

Pursuant to adjournment, the taking of this deposition was continued on Saturday, March 26, 1948, commencing at 8:22 o'clock a.m., at the same place, all parties being present as before, whereupon the following proceedings were had and done:

FRANK H. GALLAGHER

resumed the stand as a witness on behalf of Libelants—Cross Respondents, and continued his deposition as follows:

Direct Examination (Continued)

By Mr. Waddoups:

Mr. Waddoups: May the record show that this is a continuation of the deposition of Mr. Frank H. Gallagher, which was continued from March 18, 1949, and that the same parties are present, and both parties involved in this deposition are represented by their respective proctors.

Mr. Collins: Right.

Q. Now, Mr. Gallagher, during your examination at our last [1490] hearing you very modestly stated that you did not consider yourself an expert. What training had you had prior to going in with the Shipping Bureau? By that I mean your education and background.

A. Well, I went to St. Johns, New York, and I went to Wisconsin, Milwaukee.

(Deposition of Frank H. Gallagher.)

Q. What was the nature of the courses you took?

A. I have taken engineering. I graduated from the New York Electrical School, and I think that was in '26,—or '28, that's right. I was for four years a Cadet and continued at sea until I got my chief engineer's license, both steam and Diesel.

Q. How many years at sea did you have?

A. About ten. I worked for the Sun Ship Yard, and then I came with the Bureau, and of course prior to being transferred to the West Coast why I spent about three years at large manufacturing plants; Diesels; that is, with the Norberg plant, and Allis-Chalmers, and that would be, in general, about what my experience is, as far as that is concerned.

Q. Mr. Gallagher, is there any type of examination that is given to qualify you for appointment to the post you now hold?

A. No, there is no examination, as far as examination is concerned. It is a matter of record, perhaps much as in your own profession, as you would go from one law firm to another, and be accepted on your past record and experience. [1491]

Q. All in all, prior to your appointment to the post you now hold, how many years of experience did you have with shipping, steamships in particular? A. You mean, inclusive?

Q. Yes, Mr. Gallagher.

A. Well, that would show about 18, as far as the general association.

Q. And during those 18 years will you give us

(Deposition of Frank H. Gallagher.)

as best you can remember the different positions you have held?

A. Well, I have been with the Bureau since 1941; that would take in eight; and the other times, as I said before, about ten would take in the Sun Ship Yard time, and my four years as Cadet, and then up to First Assistant Engineer on both steam and Diesel ships, of an ocean-going nature.

Q. And what organization established your status as an assistant chief engineer?

A. Well, that question I don't believe is quite right. As an assistant chief engineer? The license issued to me as chief engineer, why that is a government examination.

Q. Do you recall in what year your received that license?

A. Yes, 1939, I got my chief's license, I am sure, in both steam and Diesel. Perhaps you had better make that 1940 on the Diesel, and I got a professional engineer's license in the State of Washington June, 1948.

Q. Now you have testified to going on a sea trial with this [1492] vessel, the "Urania". Do you recall whether or not anyone accompanied you on that sea trial, to observe, as you were observing, the manner in which the vessel operated?

A. Yes, the owner's representative, Mr. Harry Williams.

Q. And during the course of your inspection of the "Urania" what portion of the time, during

(Deposition of Frank H. Gallagher.)

that inspection, was occupied in the company of Mr. Williams?

A. Well, we were more or less in constant company.

Q. And in the course of that inspection were comments made by one to the other, as to the condition of the vessel?

A. Yes. It was his obligation and his job to be just as much interested in the work and to judge its functional operation, as I was."

Mr. Howard: I move to strike that as not responsive.

Mr. Hokanson: It is responsive, I submit, Your Honor.

The Court: The word "Yes" is responsive, but what follows is not. It will be stricken.

"Q. And in the course of judging that functional operation were you and Mr. Wililams in disagreement on any particular phases of that operation?

A. No, we were not.

Q. Did Mr. Williams ever give any opinion to you as to whether or not, as representative of the ship's owners, he was satisfied or dissatisfied with the inspection?"

(Deposition of Frank H. Gallagher.)

Mr. Howard: I will waive the objection.

"Q. You may answer question.

A. No. Mr. Williams was quite satisfied with the repairs as carried out. There were a few recommendations which we did make during the sea trial.

Q. Do you recall what those were, specifically?

A. Yes, I do.

Q. Will you enumerate them, please"?

Mr. Howard: I will waive the objection.

"A. The recommendations I made were made after having talked the operation of the engines over with Mr. Williams, and we both concurred, that a little timing should be carried out on the main engine. Other than that we were quite satisfied. [1494]

Q. Now what lead you to recommend that the timing be checked or revised, if that was at your recommendation?

A. That's true. By the hunting of the engine. By that, I mean the control was not quite right, and, if I remember correctly, we were to ascertain why the wedges came out. That, however, was later corrected.

(Deposition of Frank H. Gallagher.)

Q. And as finally delivered over to the owners, after the making of recommendations by your department, and their correction, did Mr. Williams or any other representative of the owners, to your knowledge, call attention to any further defect in the vessel?

Mr. Collins: Same objection.

A. No, sir. I believe the only recommendation or recommendations regarding the completed condition of the vessel, as far as our society was concerned, that I made, and so state here: It was found——

Q. By "here" what do you mean?

A. In my report.

Q. That being the report that was offered in evidence here earlier—or a copy of which was offered in evidence?

A. Yes. It was found that the main engine needed timing and it was recommended that the engine be timed."

Mr. Hokanson: At this point, Your Honor, I offer [1495] in evidence the report of Mr. Gallagher, which he testified to on page 5, at which time a stipulation was entered into with respect to the substitution of a copy.

Mr. Howard: Here is the original, counsel, if you would like to offer that.

(Report #3058 marked Libelants' Exhibit 17 for Identification.)

(Deposition of Frank H. Gallagher.)

Mr. Hokanson: I offer Libelants' Exhibit 17.

Mr. Howard: I have no objection.

The Court: Libelants' Exhibit 17 is now admitted.

(Libelants' Exhibit 17 received in evidence.)

LIBELANTS' EXHIBIT No. 17

American Bureau of Shipping
45 Broad Street, New York 4, N. Y.

(This Form is to be used in Confirmation of Class only.)

Report No. 3058

Tanker "Urania"

Seattle 4, Wn., Oct. 9, 1948.

This Is to Certify that the Undersigned Surveyors to this Bureau did, at the request of the Owners representative, Mr. Harry Williams, (Owners Compania Naviera Limitada), attend the steel screw motor vessel tanker "Urania", 690 gross tons, of Panamanian registry, on the 16th day of August 1948, and subsequent dates, while the vessel lay afloat and while dry on dry dock at the Winslow Yard of the Commercial Ship Repair Co., Winslow, Washington, in order to examine and report upon the dry docking, the drawing of the tailshaft, repairs and alterations, the annual boiler survey, the carrying out of Special Periodical Survey No. 1, on Hull, Machinery, and electrical apparatus

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

and also the carrying out the Annual the Classification Survey and International Load Line Survey and report as follows:

Dry Docking.

1. The vessel was placed upon the dry dock and after the underwater body was cleaned, examination was made of the stem, stern, frame, rudder, pintle, propeller, keel, and all outside shell plating which, except as further noted, were found to be in satisfactory condition.

2. Plastic Coat.

The underwater body was found coated with a plastic application from the keel to the light load line. At numerous scattered locations the plastic was found removed and at these locations the plating was bare and lightly coated with rust. The intact portions of plastic were found alligatored and bond upon being tried, was found firm. With respect to fouling, the fouling was found negligible as approximately only 10 per cent of the underwater body was found fouled. The bare plating and the loosely adherent plastic was scraped and coats of A.C., A.F., and boat topping were applied.

3. The sea-valves and sea chests were opened; chests and strainers cleaned, examined, and sea openings and connections were found to be in satisfactory condition. All valves were ground in, stems repacked, bonnets regasketed, bodies coated and valves closed in good order. Scupper and sanitary discharge valves and connections were examined

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

and, the existing together with the newly installed sanitary connections were found to be in satisfactory condition and operating order.

4. The rudder was unshipped, examined, and was found to be in satisfactory order. The pintle pin was tried to the gudgeon bushing and the fit was found satisfactory.

5. (a) The propeller was unshipped and tailshaft drawn outboard for examination. The tailshaft fitted with a non-continuous liner was examined and was found free of defect. The fit to propeller hub was likewise found satisfactory. After replacement of tailshaft and propeller the rubber seal ring was reinstalled to the external sealing arrangement. The two stern tube bearings were examined and were found in good condition. At the time of this examination the after peak tank was undergoing test and no evidence of leakage was found in the stern tube. (Drawn 9/48).

(b) Tailshaft clearance in the after stern tube bearing, by caliper measurements, was found to be .060".

6. Approximately ten feet (10') of the port side bilge keel was found slightly distorted, together with the port side plating of the 1st strake below sheer in way of No. 4 cargo tank and that plating of plate No. 6 from forward of the sheer strake was also found set in slightly between longitudinals. These conditions are not of a serious nature and

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

repair to which need not be carried out as a condition of maintenance of class.

7. Several indents in the sheer strake plating, port side, plates Nos. 1, 2 and 4 from forward were removed by fairing plate surfaces.

8. The port and starboard bower anchor chains were ranged, examined and, upon recommendation, frozen connecting links were freed up and chain was then found in satisfactory condition. The vessel has 105 fathoms of chain on the port side and 105 fathoms of chain on the starboard side.

Special Survey No. 1. Hull.

9. (a) The forepeak, afterpeak, cofferdam, ballast tank, double bottom and the eight cargo tanks were cleaned, examined internally and, with the following exception, the bulkheads, frames, floors, and plating were found to be in satisfactory condition. All closing appliances to these compartments were found gasketed and were in good order. Upon recommendation the sounding pipe to the after peak tank was extended to the bottom of the tank. The sounding pads were found in order.

(b) Three floors in the afterpeak tank were found partly buckled and, upon recommendation, repair to these floors was effected by fairing and, in addition strengthening of the floors was provided by installing vertical stiffeners on each side of the stern tube.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

10. All of the aforesaid tanks were tested hydrostatically to classification rules. The tanks were examined and, after one minor fracture in the deck plating in way of No. 3, starboard cargo tank and another minor fracture in the sheer strake plating just below the fender in way of No. 4 port cargo tank were chipped out and welded, the tanks were then found to be tight and in satisfactory condition. The peak tanks were coated with a wash of cement.

11. At the time of ranging the anchor chains the chain lockers were examined and were found clean and in good condition.

12. The masts, rigging, hawse pipes and equipment thereto were examined and were found to be in satisfactory condition. In order to extend the height of the forepeak tank vent it was necessary to locate the pad for the foremast stay. This relocation was carried out as directed and in a satisfactory manner.

13. Alterations to the crews quarters aft and bridge were carried out in accordance with arrangement plans drawn by Sparkman and Stevens. Arrangement plans are:

Dwg. No. 837-1-Alt-1 Arrangement Plan 6/24/48.

Dwg. No. 837-3 Profile 7/1/48.

Dwg. No. 837-5 Deck house and bridge conversion 6/28/48.

Dwg. No. 837-7 Ballast to F. O. Tank 6/30/48.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

The vessel was not lengthened at this time.

14. The weather deck plating from stem to after end of poop deck was scaled, examined, and was found to be in satisfactory condition. Examination of deck plating within the after quarters was afforded by removal of deck composition and plating was found in good condition. Plating of decking in the peak spaces was found in likewise good condition.

15. The newly installed 10″ and 15″ port lights were examined, tested, and were found watertight and to have been installed in a satisfactory manner. The plating in way of the newly installed port lights and in way of the original port lights was found in good condition.

16. All pressure-vacuum relief valves fitted to the cargo tank vents were opened, overhauled, examined and were found to be in satisfactory condition. All steaming out coils and the steam smothering steam lines to the cargo tanks together with fire lines were tested and defective piping was renewed.

17. Engine and pump room spaces were examined and the condition of plating, framing and bulkheads was found satisfactory. Bilges were cleaned.

18. The pumping arrangements for the forepeak, peak spaces, and the chain locker were tried and were found to operate satisfactorily.

19. Fire Protection.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

Carbon dioxide system—Steam Smothering.

(a) The CO^2 system installed to each of the eight cargo tanks and to the spaces within the forecastle spaces was removed in its entirety. In place of this inert gas installation each of the cargo tanks and the spaces within the forecastle were piped for steam smothering. Forecastle spaces include the bunker tank (formerly ballast tank) paint locker, and space above the bunker tank tanktop.

(b) The smothering lines entering the cargo tanks are of 1¼" dia. and those entering the forecastle spaces are of 1" dia. The branch lines entering the individual compartments are fitted with shut-off valves and the distribution line is fitted with a master shut-off valve. All of these control valves are at an easily accessible position above the freeboard deck and all valves are permanently marked. Drain lines are fitted and all exposed piping is adequately protected.

(c) There are an adequate number of fire main outlets and outlets are so arranged that any part of the vessel may be reached with two streams of water. Outlet connections are of the "Y" type and 1½" hoses were connected to the outlets.

(d) The fire pump was operated and was found to deliver a pressure of 100 PSI.

(e) A sufficient number of foam type portable extinguishers were placed at various stations within the passages in the crews quarters.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

Machinery

20. It was previously reported in Seattle Report No. 2638 dated 2/5/48 that the cylinders of the main engine were fractured. The undersigned examined the cylinders and found each of the six cylinders to be fractured at their water jackets. The cylinders were renewed. The crankshaft was cleaned, examined and, as further stated, was found in good condition.

21. The main engine was completely dismantled and crankshaft was raised. Examination was made of the engine frame, tie rods, crankshaft, fuel pumps, liners, pistons, connecting rods, wrist pin and connecting rod and journal and thrust bearings all of which were found to be in satisfactory condition. Intake and exhaust valves were ground in and piston rings were renewed. Cooling pumps were found in good condition.

22. The two 40 K.W. six cylinder diesel driven generators were completely dismantled and crankshafts were removed. Examination was made of the crankshafts, engine frames, pistons, connecting rods, fuel pump, cams and valves and motion linkage thereto, wrist pin and connecting rod bearings which, except as further noted, were found to be in satisfactory condition. Piston rings were renewed and valves were ground in.

23. The crankshaft of the starboard combination generator and cargo pump was found fractured and

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

cargo pump was found fractured at No. 7 journal. The shaft was renewed.

24. The cylinder block of the port generator was found fractured and the block was renewed.

25. The liquid end of the two gear driven cargo pumps within the pump room were opened, examined, and were found to be in satisfactory condition.

26. The fire, bilge and sanitary pumps were opened, examined, and, were found to be in good condition.

27. The six cylinder diesel engine of the port cargo pump was completely dismantled, and examination made of crankshaft liners, cylinders, valves, fuel pump, cams and linkage, pistons, connecting rods, crosshead and connecting rod bearings, journal bearings, all of which were found to be in satisfactory condition. Intake and exhaust valves were ground in and piston rings were renewed.

28. The two air compressors were dismantled, and examination made of shafts, connecting rods, bearings, pistons, cylinders, valves and "V" belt drives all of which were found in satisfactory condition. The compressor valves were renewed.

29. The three main air reservoirs were hydrostatically tested to a test pressure of 350 P.S.I. The tanks were examined and were found tight and in satisfactory condition.

30. The lubricating oil coolers and the inter-

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

coolers were examined and were found in good condition.

31. The fuel day tanks were examined after having been filled and the tanks were found tight and in satisfactory condition.

32. The bearing and shafting, gears, etc. of both the anchor windlass and steering engine were examined and were found to be in satisfactory condition. Engaging arrangements on both the steering engine and anchor windlass were tried and were found to operate satisfactorily. Upon recommendation, a relieving tackle was furnished for the steering engine.

33. Upon completion of aforesaid examination and repairs, a sea trial was held during which time the undersigned examined operation of the main engine and all auxiliaries including the main cargo pumps. It was found that the main engine needed timing and it was recommended that the engine be timed. This recommendation was complied with and the undersigned re-examined the engine and found same to be in proper operating order.

34. For the purpose of record the manufacturer of the newly installed F.O. transfer pump installed above the bunker tanks was:

Pump—Blackmer Pump Co. Pump size 1501-10.

Motor Master Motor Ser. L.M. 6428.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

Electrical.

35. All motors were removed from the vessel and armature and field windings were cleaned, baked, and reinsulated. Brushes and bearings were renewed as found necessary. The undersigned examined the motors and found same in satisfactory condition.

36. Insulation resistance on all power and lighting circuits was measured by megger and all circuits having a low value of resistance were restored to their original good order by the removal of grounds and defective wiring and lighting fixtures.

37. The power and lighting cables were examined as far as practicable and were found in satisfactory condition. The fittings on the main switchboard and distribution panels were examined and, upon recommendation various circuits were properly fused.

38. The two generators were run separately and in parallel and circuit breakers and switches were tested and generators were found to operate satisfactorily. The armatures and fields of both generators were examined and were found to be clean and in satisfactory condition. The operating and overspeed governors were found to function satisfactorily.

39. Upon recommendation a wood grating was placed in front of the main switchboard.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

Special Survey No. 1 Now Complete

40. Annual Boiler Survey.

(a) The main vertical heating water coil boiler was hydrostatically tested to 225 P.S.I., examined, and was proved tight.

(b) The furnace was opened, dome removed, and the newly installed nested tube bank examined and was found in good condition. The steam separator was examined without opening and was found in likewise good condition.

(c) The steam separator and water mountings together with the feed line strainers and valves were opened, examined, and were found in good condition. The valves were ground in as directed.

(d) Relays and resistors together with the motor drive were examined after having been overhauled and were found in good operating order.

(e) The main safety valve was set under steam to relieve at a pressure of 100 P.S.I.

(f) The standby boiler was removed by the owners.

The Annual Boiler Survey is now complete.

41. Annual Survey.

(a) All parts of the steering engine were examined and were found in good condition.

(b) The conditions of assignment namely; extending poop ventilator coamings, furnishing wood plugs and canvas boots to ventilator coamings, furnishing covers for the hooded ventilators and the

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

replacement of the exhauster duct leading to the pump room, together with extending airpipes and sills to the required height and the freeing up of dogs on doors and cargo hatch covers were carried out.

(c) Coamings of ventilators to spaces below the freeboard deck and below decks of superstructures, cargo hatch coamings, hatch covers and their supports were examined and found in good condition.

(d) The gangway from the forecastle to the poop deck was examined and was found in good condition.

(e) Watertight doors in bulkheads and closing appliances in superstructure bulkheads and for air and sounding pipes were examined and were found in good condition.

(f) Machinery casings, guard rails and all other means of protection provided for openings and for access to crews quarters were examined and found in order.

(g) The assigned load line marks were cut in the vessel's sides. The marks were verified, found in accordance with the assignment, plainly visible and well marked.

(h) Provisional load line certificate No. S3014, dated Sept. 21, 1948 was issued for a valid period of three months.

42. Summary.

(Deposition of Frank H. Gallagher.)

Libelants' Exhibit No. 17—(Continued)

(a) Vessel's spare parts and equipment were checked and were found sufficient in number and of good quality.

(b) The equipment was likewise checked and was found in good order and in accordance to Rules.

(c) In view of the vessel being fitted with a Radio Phone and Direction Finder it is recommended that the abbreviations Radphone and RadDF be distinguished in the record in the case of this vessel.

(d) Radio Phone. Transmitter TCR-RCA, Received RMC 45. Direction Finder Transmitter DF RCA, Receiver Radio Mfg. Co.

In the opinion of the undersigned the vessel is in a seaworthy condition and fit to retain her present class with this Bureau.

/s/ F. H. GALLAGHER,
Surveyor

D. R. HEAD,
Surveyor

American Bureau of Shipping.

(Deposition of Frank H. Gallagher.)

"Q. Give us in substance what you recall, Mr. Gallagher, and if that exhibit refreshes your memory you can use it for that purpose.

A. I want to be specific now; no guess-work.

Q. Make your answer specific. You may use, and the record may show you are using that exhibit as a basis for your specific statements.

A. It was found that the main engine needed timing and it was recommended that the engine be timed. This recommendation was complied with and the undersigned re-examined the engine and found same to be in proper operating order.

Q. Now, Mr. Gallagher, in connection with timing, it has been asserted in this case that on November 3d of 1948 the timing of the engine had been completed, and upon being ready for sea trial the engine was run full ahead, resulting in uneven and irregular action, and resulting in the pistons heating the valves.

Have you any opinion as to what good engineering on a ship would dictate in connection with operating a vessel, with respect to timing?

Mr. Collins: I will similarly object, on the basis that the witness has not been qualified as an expert to answer this type of question.

Mr. Waddoups: You may answer the question.

A. What you related occurred a month or so after I attended the vessel. Many things could have taken place; changes; installation of new parts; perhaps a new part was placed in there

(Deposition of Frank H. Gallagher.)

which was not quite right and when they turned the engine over a valve fell into a cylinder, which I believe is what you have reference to. That is most unusual, though, however.

Q. Would running the engine full ahead, without timing it first, on a sea trial, be in accordance with good engineering practice, as based upon your experience and knowledge?"

Mr. Howard: I object to that question, since there is no evidence in this record that the engine was run full ahead without timing it first, no basis for such question being asked this witness as an expert based on a hypothetical assumption.

Mr. Hokanson: I agree, Your Honor.

Mr. Howard: I move it be stricken.

The Court: Both question and answer are stricken.

"Q. And tell us, briefly, what is done in the timing of the engine.

A. Well, when you time an engine you set your positions. In other words, the crank relations to the position points on the flywheel, which will, as far as the pistons are concerned, when they are approaching top center you will have a degree of regulation. By that I mean you may inject fuel for a given degree period. The degree period, of

(Deposition of Frank H. Gallagher.)

course, being predetermined by the advance of angularity of the crank, which will in turn either raise or lower the piston. However, the actual setting, when we are talking about a two or four-cycle engine, why we are mainly interested in the degree and the period of injection; usually about 15 degrees before top center, and time with the exhaust valves or the scavenging system.

Q. Was all the machinery involved in the timing system, at the time this ship was delivered over to her owners, after [1498] your inspection, in good condition and repair?

A. Yes. The recommendation I made to the owner's representative was carried out by the ship yard.

Q. Now there is a claim asserted in this case, Mr. Gallagher, that the timing gears were later in disorder, and that it might have come from contamination of the lube oil. Have you any opinion as to whether or not, subject to Mr. Collins' continuing objection on your opinion evidence,—which the record may continue to show, Mr. Collins.

Mr. Collins: Yes.

Q. (Continued): ——the contamination of the lube oil would be the cause of the galling of the gears; the timing gears? A. Very possible.

Q. Would you say that the contamination of lube oil would cause the galling of timing gears without also injuring or doing damage to the main crank and trust bearings and other working parts of the

(Deposition of Frank H. Gallagher.)

engine which are lubricated by the same oil?"

Mr. Howard: I object to that question as not containing proper assumptions to permit the witness to express an opinion in this case, and also on the ground that the answer of the witness on page 27 is not responsive to the question. I move to strike the answer.

The Court: It is my opinion the question is appropriate. What have you to say as to the objection to the answer, Mr. Hokanson?

Mr. Hokanson: Over his objection, I will withdraw the question and have the answer stricken.

The Court: It is so ordered.

"Q. Well, the question I put, Mr. Gallagher, and maybe I did not make myself too clear, not being an engineer; If there were contaminated lube oil, which was contaminated to a sufficient extent to cause galling of the time gears, would it or would it not, in your opinion, affect other bearings and other working parts of the engine?

A. If the lubricating quality were destroyed, why the lube oil would not perform its function, and I believe we would have serious consequences.

Q. Well, to put it another way: If you found that the galling of gears had occurred only in the timing gears, and not in the other bearings and

(Deposition of Frank H. Gallagher.)

working parts of the engine, would it or would it not be your conclusion that the galling of the time gears had been caused by contaminated lube oil?

A. Not necessarily; if the timing gears are lubricated by means of a jet——

Q. Was that the case in this ship?

A. I don't remember. I have been on many, many ships since [1500] that time, and it is just another job to me; just another ship.

Q. You may continue.

A. If the lubricating oil was delivered to the timing gears by the installation of jets, why the jets could plug up, or the position of the jets could be altered, due to some mishap.

Q. Now you have stated, Mr. Gallagher, that this was just another ship to you. Do you know where the owners obtained the "Urania" or from whom they obtained it?

Mr. Collins: I will object to that as hearsay.

Q. Just answer whether or not you know.

A. No, I do not.

Q. At the time you made your inspection was there any indication to you of leakage into any of the lube oil leads in the engine?

A. If I remember correctly, the lubricating oil coolers were taken from the vessel, cleaned and replaced, and being part of the lubricating oil system, of course, why they were checked while in operation, and undoubtedly during the many times of dock trial runnings of the engine.

(Deposition of Frank H. Gallagher.)

Q. Is there any way that you can describe to us from your familiarity with this vessel and similar engines that there might be leakages of sea water in the cylinders of the engines?"

Mr. Howard: I waive the objection. [1501]

"A. Yes, if this engine, the cylinders of this engine, are cooled with sea water.

Q. Do you recall whether that was the case in the "Urania"?

A. No; I believe, if I remember correctly, that with the "Urania" the cylinders were cooled with khat we call a heat exchange system, whereby the cooling agent, as far as the engine is concerned, is passed through a cooler, and salt water being the cooling medium, on the other hand, would be passed also through the cooler; a tube division forms the separation. If the cooler were to fracture, or the tube were to break, whichever side had the greatest pressure,—By that I mean, that if the cooling water passing through the engine cylinders was being forced through there at 30 pounds to the square inch, and the cooling water, or perhaps, we will say, the sea water, in this case, was being circulated through the cooler at 25 pounds per square inch, we would lose our fresh water, and after having expelled all that water why the sea water, being the greater quantity, would have entered the system.

(Deposition of Frank H. Gallagher.)

Q. Now in your inspection did you examine the oil leads into the cylinders?

A. You mean the lubricating oil leads?

Q. Yes, the lube oil leads?

A. There are no lube oil leads into the cylinders. There are cylinder lubricators which furnish cylinder oil to the [1502] walls of the liner. They were examined as far as the external connections are concerned, and they were found to be in order.

Q. There is a charge made in this action that the lube oil leads into the cylinders were not tight.

A. That I do not know.

Q. Do you know anything about that?

A. No, I didn't. That is something that is up to the vessel's personnel to report upon.

Q. Was there anything in your inspection that indicated, at the time of making that inspection, that that situation existed?

A. No, there was not.

Q. Were you looking for such a situation?

A. Such a situation normally would be drawn to a person's attention by a condition which would have appeared; otherwise, why it is something that you cannot see. In other words, it is entirely enclosed in the cylinders.

Q. Now on this inspection that you made, was the chief engineer of the ship in your company?

A. Many times.

Q. Was he in your company during the sea trials? A. Indeed he was.

(Deposition of Frank H. Gallagher.)

Q. And were there any complaints about the motor, or other parts of the ship, within the province of your inspection, [1503] that were made by the chief engineer and not corrected, to your knowledge?"

Mr. Howard: I will waive the objection.

"A. No, not to my knowledge. We both, of course, agreed about the timing of the engine.

Q. Is it a fair statement to make then, Mr. Gallagher, that with respect to the condition of the lube oil leads into the cylinders, that that would be a matter peculiarly within the knowledge of the ship's crew?

Mr. Collins: The same objection, to it being a hypothetical question."

Mr. Howard: I object to that as a leading question and not a proper question to ask the opinion of this witness on on a hypothetical basis. There are not sufficient assumptions, if the Court please, in that question to allow the witness to make a fair appraisal of the situation existing on the Tanker Urania.

Mr. Hokanson: I am willing that the question be withdrawn and that the following questions which relate to the same matter be withdrawn. [1504]

(Deposition of Frank H. Gallagher.)

"Q. Now you have mentioned the heat exchanger. Were the heat exchangers on this vessel inspected and checked by you?

A. I saw the heat exchangers, I believe, up in the machine shop. I am quite certain they were taken off the vessel, and they were adjusted up there, and, of course, later on, why they were placed in operation aboard the ship.

Q. Were they in operation during your sea trials? A. They were.

Q. And have you anything to say as to how they were operating on that sea trial?

A. The temperature results obtained by the use of the coolers was satisfactory.

Q. In the course of your inspection was it either your duty or the actual fact that you checked all lines and pipe leads—— A. No.

Q. ——and other elements involved in the cooling system? A. No, no.

Q. And did Mr. Williams, or anyone else on behalf of the ship owners point out any difficulty or any defect in the heat exchangers during the sea trial, and during your inspection, which were not corrected?

Mr. Collins: Objected to as hearsay.

A. No.

Q. Are you familiar with the operation on long sea voyages of the type of engines as was in the "Urania"? [1505]

(Deposition of Frank H. Gallagher.)

Mr. Collins: Same objection; he has not qualified as an expert. A. No, I am not.

Q. How many years at sea did you have, Mr. Gallagher? A. About ten.

Q. And in the course of those years at sea did you gain any experience as to the effect of vibration, on long sea voyages, upon such parts of an engine as the oil leads in the cylinders? Will you answer that "yes" or "no." A. "Yes."

Mr. Howard: I move to strike the rest of the answer after the word "yes" as not responsive to the question.

The Court: The interrogator asked the witness to confine it to yes or no. The rest of it, after "yes", is stricken.

"Q. And is there, in such cases, any reaction or action by the motor which would serve as a warning to the operator, or to the engineer, we will say, in charge of the motors or the engine?

A. Before, as a general rule, an action is set up which would notify the operator of a condition developing,—In other words, before, in my opinion, complete break-down would [1506] result, why the cause thereof would have been progressive.

Q. And what indications would you normally expect? Let me put the question in another way:

(Deposition of Frank H. Gallagher.)

What devices or other evidence of the defect would be present to show an engineer that there was some defect in the operation of the engine?

A. As far as the cylinder lubrication is concerned?

Q. Yes, that is correct.

A. Such a condition would be audible, and perhaps if the heat conditions was great enough why there would be a slowing down of the engine.

Q. Are there any meters or indicators of any kind by which an engineer can tell whether or not there is some interference with proper lubrication of the cylinders?

A. Yes, there is. That is, as far as what is indicative of what would be taking place within the cylinder itself. To my knowledge there are no instruments which would actually give a tell-tale on the surface that the lubricating oil or cylinder oil is carrying out. However, the amount of cylinder oil going into each cylinder is visible, as most of the lubricators installed do have a sight-glass which will show the drops of cylinder oil being forced into the lubricating lines. The sight-glass serves two purposes, one being to show the oil is passing through the medium, which is usually glycerin, and the other purpose being to time the amounts of oil by drops each minute as it is being injected into the cylinder.

Q. There is, then, a visual means by which an engineer can tell?

(Deposition of Frank H. Gallagher.)

A. There is a visual means, on the admission.

Q. Now assuming that there was water leakage into the oil in the crank-case, were there any instruments on the "Urania", if you recall, that would give an indication to the crew?

A. Water being dumped into the lubricating oil?

Q. Yes, of water leakage into the lubricating oil, in the crank-case?

A. To the best of my knowledge I know of no provision providing for ready-at-hand, notice of such a condition if it were occurring. Of course they could by sounding the sump tanks at various intervals, and if an appreciable amount of water entered the lube oil why it would be noticed. That is, by actual sounding.

Q. Now, would any disruption of the lubricating system in any way affect the temperature of the engine, which might be reflected by indicators or instruments?

A. Yes, if I am correct in the belief,—I believe that there were lubricating oil thermometers attached to the engine giving the inlet and outlet temperatures of the lubricating oil. If the lubricating oil broke down, as far as viscosity s concerned, why damages would occur." [1508]

Mr. Howard: I move to strike the answer as not responsive.

(Deposition of Frank H. Gallagher.)

Mr. Hokanson: I believe it is responsive.

Mr. Howard: I will withdraw my motion.

"Q. And would there be anything to warn the crew of the vessel, or the person in charge of those engines, that there was some interference with the proper lubrication, besides the audible means you have mentioned?

A. No. Again, to my knowledge, I know of no audible means to notify the crew.

Q. When you said there were audible means, earlier, by that what did you mean?

A. Audible means; by that I referred to the condition developing from lack of lubrication. That is, on cylinder lubrication, which is entirely different from that of the lube oil system lubrication.

Q. All right. On cylinder lubrication what would be the audible indication that there was something wrong?

A. When the lubricators failed, or the lubricator failed to deliver the required amount of cylinder oil to the cylinder or cylinders we would have the condition of heat, which, of course, would be caused by or as a result of friction between the piston rings and the cylinder liner, and as a [1509] result of this condition why there is a strong possibility of eventual seizure of a piston; seizure, of course, in some cases could mean the actual slowing down of the

(Deposition of Frank H. Gallagher.)

engine to the point of where the piston and the piston trunk fractured.

Q. Would this audible means to detecting some disruption of the lubricating system of the cylinders be what we land-lubbers call a "knock in the motor"?

A. No, I believe not. A knock is usually a condition caused by pressure, which is entirely different from that caused by or as the result of friction.

Q. Would the seepage of water into the lubricating oil be likely to cause a knock in the motor?

A. It is quite possible.

Q. If a knock did develop in the motor while the vessel was under way, or by other audible means the engineer was shown, or other visual means the engineer was shown that his engine was not operating correctly from the standpoint of lubrication, what does good seamanship and engineering dictate under those circumstances, if you care to say?

A. For a knock developing in an engine?

Q. While under way?

A. While under way?

Q. Yes.

A. The sensible thing to do is to stop that engine and investigate. [1510]

Q. And do you know whether or not such a condition can or cannot be cured at sea, or improved at sea?

A. That is rather expecting too much. In other

(Deposition of Frank H. Gallagher.)

words, I would appreciate the question being made specific.

Q. Let me put the question this way, Mr. Gallagher: If by audible or visual means the engineer is advised that there is something wrong with the operation of the engines while under way, what measures should be taken, in your opinion, upon determining that fact?

A. If the sound is coming from within the enclosed portion of the engine, the engine should be stopped and an investigation carried out to ascertain the cause of that. This knock, however, could be caused by fuel pressure or it could be the result of a burnt-out bearing, misalignment, or many, many things.

Q. Well, would a failure to take steps to correct such a condition, when it was first determined, assuming that it was determined in the early stages of the development of such a condition, cause damage to the engine by continuous use with the defect existing?

A. Well, there again we are not specific.

Q. What I mean, Mr. Gallagher, is this: Does it add greater damage to continue to run the engines after such a knock has developed?

A. Yes, I believe so. [1511]

Q. And would early treatment, or early repairs, prevent further damage? A. Yes.

Q. So that to permit it to continue, knowing

(Deposition of Frank H. Gallagher.)

that it was there, would cause greater damage to the engine than if an early repair was made?

A. Yes, I believe such a condition should be corrected.

Q. And in your opinion, and from your experience, does good seamanship dictate that such steps be taken when a defect in the engines has been detected; while under way? A. Yes, that's true.

Q. And would a failure to take those steps result in continuous damage to the engine by its continuous use with such defects? A. Yes, it would.

Q. Now, in your sea trial did you find anything in these engines which indicated to you the necessity of making repairs to eliminate the defects that could be detected either by audible or visual means?

A. No, other than timing we found the engine equipment to be quite satisfactory.

Q. And I take it from your earlier testimony that the defective timing was repaired to your satisfaction? A. That was corrected.

Q. Mr. Gallagher, I don't recall whether you have answered [1512] this question or not: Can high pressures in any way cause leaks to pipes carrying coolants to heat exchangers?

A. Yes, of course.

Q. And in your opinion could that develop while under way in a ship which had left port with its heat exchangers and cooling system in good condition? A. Yes, it could.

Q. Where would this pressure come from?

(Deposition of Frank H. Gallagher.)

A. The pressure could be increased by the closing in on the discharge side of a pipe or cooler, where we would, of course, build up a volume and then consequent pressure, and damage could result from the pressure which was placed upon a cooler or pipe which was in excess of that pressure which the cooler or pipe was designed for.

Q. Mr. Gallagher, assuming the following to be the fact: That a ship put out of Port Angeles, Washington, and went to Manzanillo, Mexico, with the following defects in its engine system: Air-locking in the telemotor system, causing oscillation; loose lube oil leads into cylinders, which permitted leakages of sea water into those cylinders; heat exchangers that were dirty and leaking badly; timing off, so that the wedges pulled out; leakage into the crank-case of sea water; leakage in the pipes carrying the coolant to the heat exchangers. Would such vessel, in your opinion, be able to negotiate the trip from Port Angeles to Manzanillo, Mexico, [1513] without a breakdown?"

Mr. Howard: I will object to that hypothetical question on the basis of there being no evidence to establish any air-locking in the telemotor system; no evidence to establish leaking of sea water into the cylinders, the fact being from the evidence, as I recall, it was fresh water that entered the cylinders; and further on the ground that there is no

(Deposition of Frank H. Gallagher.)

evidence, as I recall, of timing being off so that the wedges were pulled out.

Mr. Hokanson: I will stipulate that the question may be withdrawn on the ground it doesn't incorporate proper considerations.

"Q. Did you inspect the fire, bilge and sanitary pumps? A. Yes, we did.

Q. Did you find those satisfactory?

A. Yes, we did.

Mr. Hokanson: At this point I believe it was agreed between counsel that further direct examination could be had following cross-examination of the testimony [1514] up to that point.

"Cross-Examination

By Mr. Collins:

Q. Mr. Gallagher, do you recall the last date on which you saw this ship?

A. Yes, I do. I believe it was on a Friday or a Saturday.

Q. Do you recall the date?

A. My report indicates October the 9th as being the last date of attendance.

Q. Do you know what date the ship left the yard? A. I don't know the exact date, no.

(Deposition of Frank H. Gallagher.)

Q. Do you know whether after the sea trial there were any additional dock trials or other trials?

A. The main engine was operated, and that is all that I was concerned with.

Q. It was operated on a dock trial, was it?

A. I would not call it a dock trial. The engine was revolved. As far as an actual dock trial, such did not seem to be necessary, nor was it requested.

Q. Was the engine revolved by hand or mechanically? A. Mechanically.

Q. Was the engine actually operating?

A. Yes.

Q. At the time of this inspection of this ship, the surveying [1515] of the ship, were there other ships that you were also surveying?

A. Yes, there was.

Q. Do you recall how many ships there were?

A. I would say off-hand—Do you mean in the period of my first to last visits?

Q. Yes. A. Oh, I would say maybe 15.

Q. Could you give us the average of how many ships you were surveying simultaneously? When you say 15, I assume the ships came and left?

A. That is correct.

Q. Could you strike an average as to the number of ships that you might be surveying at the same time?

A. Well, do you mean during a single day?

Q. At any given period, yes.

A. Well, it is all determined by the nature of the

(Deposition of Frank H. Gallagher.)

work, dealing with a specific attendance. I have boarded and carried out surveys of a condition offered on as many as seven ships in one day.

Q. You therefore did not spend full time on any day on any ship?

A. In the case of the "Urania" I have put in, I believe, no more than two full days; that is, two days of an attendance wherein I devoted myself exclusively to the "Urania". [1516]

Q. Do you know whether any work was performed in the yard after your survey,—after your report of survey?

A. My report closed on October the 9th, which indicated that was my last visit, and work subsequent to that date I was never advised of.

Q. Do you know when the ship left the yard?

A. I heard that it did leave about the 16th of October.

Q. So if anything occurred on the ship after the 9th, the date of your report, you knew nothing of it?

A. That is correct.

* * *

Q. Do you recall the date of the sea trial? I believe you said it was October the 6th, is that correct?

A. Oh, the 6th, 7th or 8th; somewheres around there.

Q. Do you recall the weather conditions on that date?

(Deposition of Frank H. Gallagher.)

A. The weather conditions were, I believe—they were good.

Q. Where did the trial take you?

A. We operated in Puget Sound, leaving from the ship repair plant at Winslow, and returning to Winslow.

Q. Not being familiar with the geography of Puget Sound, did that take you out into the ocean, as such, or were you confined at all times to the bay area?

A. We were confined to Puget Sound, and not necessarily the bay.

Q. Do you recall what the sea conditions were on that date? [1517]

A. So far as I remember, why good conditions prevailed.

Q. By "good conditions" you mean a fair sea?

A. That is correct.

Q. Was the ship turned for the purpose of checking the compass?

A. I believe that was carried out. However, that is none of my concern.

Q. You have no definite recollection of that at this time? A. No, sir.

Q. Now during the period of this run was the steering ever shifted from mechanical to manual?

A. Yes, I believe that the emergency means of steering provided was operated, and I personally witnessed the hard-over and hard-over operation of the rudder.

(Deposition of Frank H. Gallagher.)

Q. Do you have a definite recollection of that ship being operated by hand-steering on that run?

A. Yes.

Q. Do you recall how long you operated on hand-steering? A. No, I do not.

Q. You testified with respect to the bulkhead and ammunition locker. Do you have any recollection as to whether that compartment was above or below the weather deck?

A. I believe it was above the weather deck.

Q. But you have no definite recollection?

A. No, sir, I don't.

Q. How long were you assistant chief engineer?

A. As an assistant engineer, I would say about seven years.

Q. Did you ever fill the chief's spot, as such, or did you ever sign on as chief engineer?

A. For a stand-by period, yes.

Q. How long was that period?

A. Just a matter of weeks.

Q. Under way or in port? A. Under way.

Q. Will you tell us something about the inspection that you make in connection with this type of survey. You inspect the ship on arrival and then at the completion of the job, and periodically during the period when the ship is being surveyed, when the job is being performed, is that it?

A. Yes, that is correct.

Q. Is it your job on such an inspection to inspect or to report upon any conditions that might exist

(Deposition of Frank H. Gallagher.)

other than those which are to be specifically covered in your report?

A. We confine ourselves, or, rather, I confine myself to surveys dealing with classification, when requested, and carry out a survey for classification.

Q. And this type of survey was a classification survey, is that correct? A. Yes, sir.

Q. There are a number of ways in which lube oil is cooled; various types of cooling systems for it? [1519] A. Yes, that is true.

Q. Would you be able to tell us how many types there are; a rough classification?

A. Well, we could have—in general, I wish to state that as employed aboard ship—shipboard, it is pretty much the same. By that I mean that we have a tubular cooler wherein the sea water passes through either one, or perhaps two or three; more frequently two than three—it passes through the tubes and the lubricating oil is introduced usually at the top of the cooler and passes over the surface of the tubes, guided by baffles.

Q. Is it correct that in the determination of whether or not there might be leakage of water in the cylinders it would be necessary to determine exactly how the cooling system operates on a particular ship, in order to give an opinion as to the cause of the leakage?

A. That is rather—not difficult to answer, but it is rather hard to frame a reply, insomuch as with reference to a leak, a leak of a minor nature would

(Deposition of Frank H. Gallagher.)

not be readily observed, and a condition of breakdown of the lubricating quality would be very progressive. A sudden rupture in the quality of the lubricating oil could take place readily if a tube or tubes failed completely.

Q. But that is something you would have to determine upon observation, is that correct? [1520]

A. That is very true.

Q. Do you recall whether on the "Urania" the lube oil system had sight-glasses? A. No.

Q. You have no definite recollection?

A. No, I cannot recollect.

Q. Do you recall whether there were lube oil thermometers? Do you have any definite recollection of it?

A. I am quite certain there were thermometers provided.

Q. Is that answer based on the assumption that that is a standard equipment?

A. That is correct.

Q. But you have no specific recollection?

A. I do have a—I am quite certain of having a specific recollection.

Q. Now is it not true as to the engine, conditions at sea may be such that an engine may break down for many causes? A. That is true.

Q. And is it not true that in order to determine the cause of the breakdown it is necessary to know all the essential factors that go into it?

A. Absolutely.

(Deposition of Frank H. Gallagher.)

Q. Isn't it also true that it is very difficult to tell on shore exactly what might happen or what might have happened at sea unless you have had an opportunity to examine the [1521] people who would know, at sea? A. It is.

Q. And therefore is it not correct that any answer which might be given to a question in connection with breakdowns would necessarily—to a certain extent, at least, be a hypothetical answer, depending perhaps on the resolution of certain questions which you might have only in your mind, one way or the other?

A. Specificness is required.

Q. Is it true, Mr. Gallagher, that in connection with the answers that you have given to the various questions proposed to you that there may have been factors existing on board the ship of which you are not presently aware, the knowledge of which might have caused you to give a different answer?

A. I believe my replies to the questions were based upon the examination of the machinery, and my thoughts go back to the time of such examination, and many things could occur, which of course brought these conditions forth, which were a result of failures. Insofar as my examination was concerned, if the general satisfactory conditions existed and continued to exist as was found existing at the time of my survey, why I don't believe such a failure from such normal function would have occurred.

Q. Then would it be correct to say that correc-

(Deposition of Frank H. Gallagher.)

ting the timing which you found deficient on the sea trials—that [1522] the answers to your questions were based upon the situation as you observed it at the time of the sea trials?

A. That is correct.

Mr. Collins: That is all.

* * *

Direct Examination (Resumed)

By Mr. Waddoups:

* * *

Q. Mr. Gallagher, in response to a question put by Mr. Collins you stated that before a definite answer can be given as to the reasons for certain things happening at sea you must know all of the factors involved? A. That is correct.

Q. Would one of those factors be the manner in which the vessel was operated and maintained by the crew?

A. Maintenance, of course, is a subject which is purely one of concern between the company operating the vessel and the personnel they place aboard, and as we are not a regulatory body, inasmuch as the operations are concerned, I feel that it would not be proper for me to pass a remark.

Q. Well, Mr. Gallagher, I didn't mean by this to ask you to pass any remarks on the specific crew. What I am driving at is this: Can a vessel in seaworthy condition leave a port in that condition, and because of improper maintenance and operation by its crew be rendered unseaworthy? [1523]

(Deposition of Frank H. Gallagher.)

A. Very definitely.

Q. Therefore the extent to which a vessel might be damaged, or the extent to which further damage might be prevented, could depend upon the operation and maintenance of that vessel by the crew?

A. That's right."

Mr. Hokanson: At this point apparently a survey was handed to the witness.

Mr. Howard: It is already admitted, counsel; it is Mr. Dupuy's survey.

Mr. Hokanson: That would be A-22, Your Honor.

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* * *

"Q. Calling your attention to the portion of that report of survey under the caption "Found," do you find any defects there which were evident to you upon your inspection of the vessel in Puget Sound?

A. No. I do not know of such a condition existing.

Q. Have you any opinion, Mr. Gallagher, as to the cause of the defects described there?

Mr. Collins: Again, for the purpose of the record, I wish to note a continuing objection to all opinion questioning. [1524]

Mr. Howard: I object to that question as not giving the witness any basis for the assumptions

(Deposition of Frank H. Gallagher.)

other than the reading of the report, this exhibit that has been handed to him. The witness has testified he didn't see the ship after October 9.

Mr. Hokanson: If counsel objects, I will agree that the question and the material relating to this exhibit may be stricken.

"Further Cross-Examination

By Mr. Collins:

Q. As to the leaks that are mentioned in the last survey, Exhibit number 4, were those leaks that would be observable other than when the engine was operating?

A. Then, again, we go back to the means offered for such detection. As I have previously stated, if the amount of leakage was great an abrupt condition would occur.

Q. No; perhaps I did not make my question clear. The condition mentioned in the survey became apparent to the surveyor upon inspection?

A. That apparently is so.

Q. Would such a condition be observable when the engine was not operating? That is to say, in making your inspection would you observe such a condition to exist other than during the sea trial?

A. The surveyor found a condition which in view of the reported leaking coolers was ascertained to be as a result of the leaking coolers, and the condition as previously stated did not exist,

(Deposition of Frank H. Gallagher.)

when I made the survey of the vessel, and I have not perused the engine log, and I believe such examination would indicate whether this condition was abrupt or whether it was progressive.

Q. When a ship comes into the yard and you are surveying it, do you inspect the log of the ship before making your survey?

A. No, we don't unless we are attending the vessel for the purpose of carrying out a damage survey.

Q. Then the type of inspection you make would be a visual inspection, or by the use of such tests that might be required to determine the condition?

A. When I am attending a vessel for the purposes of classification I do not request an examination of the log books, and I do then carry out my survey by visual examination, and also the testing of parts requiring tests.

Q. Could you observe leaking fluids other than when the ship was under way?

A. As a general rule, and as I previously stated, the oil pressure is greater going through the lube oil tubes than the cooling agent, and frequently such a leakage is detected by the observations of the cooling medium being passed overboard. If a leak is in one of the coils or the tube sheet [1526] and the lube oil pressure being greater than that of the cooling agent, will pass lube oil into the cooling agent, which in turn will pass overboard, and a film of oil would be detectable.

(Deposition of Frank H. Gallagher.)

Q. That would only be observable when the main engine is running, is that correct?

A. No, that is not so. You can circulate your lubricating oil whether the main engine is operating or stopping.

Q. Was that done?

A. It may have been done, but I personally did not do so.

Q. What tests, if any, did you make to determine as to whether or not there was a leak in the fluid?

A. The lubricating oil coolers, as previously stated, I believe were removed from the vessel, and were cleaned in the plant of the Commercial Ship Repair, and they were also tested, and I believe that I did witness a hydrostatic test of the coolers, and, of course we would judge their later operation by the visual means of function. That is, by the observations of temperatures, which I believe were detected by the installation of thermometers.

Q. When the main engine was not operating?

A. Well, of course I concern myself now to the operation of the vessel during the sea trial period.

Q. Then is it correct to say that the only tests that were made in the yards were the tests that were made in the shop, [1527] and such tests as might have been made while the ship was in the sea trial?

A. As a general rule that is the only test that is ever given a heat exchanger. It is no different from the radiator on your car, which is tested in the factory, and you operate it.

(Deposition of Frank H. Gallagher.)

Q. And you have no definite recollection as to whether you observed the test made in the shop?

A. I cannot be specific to state whether it was one cooler or two coolers; I don't remember. However, I do remember witnessing a test on a cooler, which, of course, it could be the entire cooler, or lubricating oil cooler, but as previously stated the "Urania" to me was just another ship, and I cannot really bind myself too closely to this portion of equipment.

Q. You mentioned, on a number of item, on the subsequent survey, that the surveyor's opinion was a matter of opinion. A. That is correct.

Q. May I ask this: How frequently do you make a survey of the classifications specified in this report?

A. Every four years, with the exception of the annual boiler and annual classification and International load line surveys. Those surveys, as I have enumerated, are carried out every year.

Q. Now when you pass an item as being satisfactory, does that mean that in your opinion that item will stand up until the next survey? [1528]

A. That means that the equipment, as found at the time of my examination, was satisfactory at that time.

Q. But that condition may change the next day? That is, depending on the operation?

A. That condition may change by mis-use, over-use and poor handling.

(Deposition of Frank H. Gallagher.)

Q. Or there may be an inherent defect that you might not have observed, is that correct?

A. That is quite possible.

Q. Then when you say, for example, that the telemotor is satisfactory, you base your opinion, do you not, upon observation of the various parts, their apparent soundness, and its operation during the period of the sea trial? A. That is correct.

Q. But you in no way guaranty that those parts, as so constituted, will withstand continued use for any set period at all?

A. We are not a body that makes any guaranty. We formulate and give opinions.

Q. And in that opinion there is no estimate of the probable life of the particular parts?

A. In the opinions around the items referred to, no.

Mr. Collins: That is all.

Redirect Examination

By Mr. Waddoups: [1529]

Q. But in those opnions, Mr. Gallagher, do you, before giving the opinions, consider whether or not the parts which you have given an opnion on are in sufficiently good order as to be seaworthy?

A. Quite definitely; they are in our opinion sound. By "sound" I mean structurally sound.

Q. And are capaable of serving all purposes for which they are installed on the vessel?

A. For which they are intended; that is correct.

(Deposition of Frank H. Gallagher.)

Recross-Examination

By Mr. Collins:

Q. You mentioned in the subsequent survey that the matters of opinion specified might or might not coincide with your opinion.

A. The subsequent surveys, or the remarks made in the subsequent surveys, in my opinion are remarks which I feel that I would concur with in view of the conditions which are noticed in those surveys.

Q. On some of the items you said it was a matter of opinion; is that right? A. That is correct.

Mr. Collins: That is all.

Redirect Examination

By Mr. Waddoups:

Q. That is, as to the replacements? [1530]

A. They were not considered as a part of the survey, because, again being specific, I do not believe that I saw too many of the items referred to in Exhibit 4 as coming under the invooice.

Deposition Closed"

Mr. Hokanson: That concludes the deposition of Frank H. Gallagher. Cross respondents now offer the same in evidence.

The Court: That deposition is received as a part of the cross respondents' rebuttal.

Mr. Hokanson: At this time, Your Honor, cross respondents rest.

The Court: Is there any surrebuttal?

Mr. Howard: As rebuttal on the cross libelant's case, we have one witness.

The Court: Court will be in recess for ten minutes.

(Recess)

STANLEY A. LUND

recalled as a witness by and on behalf of respondent, having been previously duly sworn, was examined and testified as follows: [1531]

Direct Examination

By Mr. Howard:

Q. You are Mr. S. A. Lund? A. Yes.

Q. Are you still employed by General Steamship Company? A. Yes.

Q. At Seattle? A. Yes, sir.

Mr. Howard: I would like to have this piece of machinery marked for identification.

The Court: You may do so.

(Piece of machinery marked Respondent's Exhibit A-29 for Identification.)

Q. I will ask you if you have ever seen that piece of machinery before? A. Yes, I have.

Q. Whereabouts?

A. It was received in our office last week.

Q. You are referring to the Seattle office of General Steamship Corporation? A. Yes.

(Testimony of Stanley A. Lund.)

Q. To whom was it consigned?

A. It didn't have any markings on it when it came in, but the waybill number was the only identification it had on it. [1532]

Q. Did that show whom the consignee was?

A. To my knowledge, no, but Mr. Antippas gave me that information as the waybill number of the box that was carrying this thing up here from the vessel.

Mr. Hokanson: I object to the answer to that question as based upon what somebody else told him.

The Court: Sustained.

Q. In what manner was this piece of machinery delivered to your office?

A. It was delivered via Northwest Airlines, boxed.

Q. Were you present when it was uncrated?

A. Yes, I was.

Q. Who else was present?

A. Mr. Antippas.

Q. Did Mr. Antippas state to you what the machinery was?

Mr. Hokanson: I object to that.

The Court: Sustained.

Q. Do you know what the machinery is?

A. After having been told, yes. After I had seen it—I know what it is now. I have never seen one before, though, up until last week.

Q. What is it?

Mr. Hokanson: I object now. The witness says

(Testimony of Stanley A. Lund.)

he knows what it is after having been told. [1533]

The Court: He also said he never saw one before. I understood him to say that as a part of his answer.

Mr. Howard: He says he knows after after having seen it.

The Court: He said he never saw one before. The objection is sustained.

Q. Where has the machine been since it arrived at your office?

The Court: If he knows.

Q. If you know?

Mr. Hokanson: I don't know what Mr. Howard proposes to prove by this exhibit, but I think he should make an offer of proof at this time to foreshorten this.

Mr. Howard: I will be glad to do that at this time.

The Court: You may do so.

Mr. Howard: In the case of the cross respondent, the Commercial Ship Repair called one J. D. Gilmore as a witness, who in response to certain questions stated that he was familiar with Harrison type oil coolers, and in response to other questions Mr. Gilmore stated that in his opinion it would be impossible for leaks to occur from the salt water side to the oil side of a Harrison type cooler, for the reason that there is a gasket covering the soldered seam around where the core of the cooler is attached to the housing of the cooler, and that that gasket and the cover which fits over the

(Testimony of Stanley A. Lund.)

gasket [1534] would cover the soldered seam in such a fashion that it would be impossible for leaks to occur through the soldered seam while the covers were in place so as to allow salt water to contaminate the lubricating oil.

Mr. Hokanson: May I interrupt? Mr. Howard is now making an argument. He is not under oath. I asked for an offer of proof as to what this exhibit is. What Mr. Gilmore had to say about another type of heat exchanger has nothing to do with what this particular exhibit is and how it is to be admitted.

The Court: The objection is sustained.

Mr. Howard: I make an offer of proof by this exhibit, which has been marked for identification, that the gasket and cover do not cover the soldered seam between the core and the housing of the Harrison type heat exchanger model aboard the Tanker Urania, so that the assumption which the witness Mr. Gilmore was making and which, if the Court please, was also made by the witness Blumberg who testified Saturday and this morning, that leaks could not occur because of the gasket covering the seam—I offer to prove by this exhibit that that is a physical impossibility, and that the heat exchanger would speak for itself in that respect.

Mr. Hokanson: Your Honor, Mr. Howard's last remarks are again argumentative. He is not under oath. [1535] He proposes to prejudice our case by offering an exhibit which he knows cannot be introduced properly at this time. He wants to leave the

(Testimony of Stanley A. Lund.)

inference that someone that we have previously called has testified falsely.

I submit, your Honor, he had the opportunity of introducing this exhibit in his case in chief, and when we undertook to introduce a Harrison type cooler on Saturday last, or Thursday, Your Honor will remember that Mr. Howard objected, and we agreed that the exhibit would be withdrawn.

The Court: Have you an attitude towards this offer of proof?

Mr. Hokanson: My attitude is this: he hasn't stated properly how he proposes to establish what this exhibit is, and what its relevancy is in this case.

The Court: The Court is not sustaining the objection. You may proceed to try to authenticate the exhibit.

Mr. Howard: I will make this further statement at this time, if the Court please, that Mr. Antippas was on the stand last week, at which time he testified that after his arrival at Seattle, this cooler was received.

At the time, we were dealing with a stamped pressure that was reported to be stamped on the cooler, and I asked the witness at that time if the cooler had [1536] been shipped out from the ship. As I recall, his testimony was it had been removed from the ship and shipped out to him at Seattle, and that this is the cooler that was shipped to him

(Testimony of Stanley A. Lund.)

from the ship at a Mississippi River or Louisiana port.

The Court: I do not believe, over objection, you will be able by hearsay, saying what one said at one time and another, to identify it, but you are at liberty to ask legitimate questions.

Mr. Howard: The testimony I am referring to is in the record, in Mr. Antippas' testimony last week.

The Court: You may proceed. We have lost this time now with the offer. However, it was done in good faith, I realize that, but we have nevertheless lost the time. Proceed trying to prove the exhibit, if you wish to.

Q. Were you present when the covers were removed from this piece of machinery?

A. Yes, I was.

Q. Who removed them?

Mr. Hokanson: He is trying to identify this exhibit. These questions relate to something that was done to the exhibit.

The Court: The objection is overruled.

Q. Do you recall the last question? [1537]

A. Yes.

Q. Can you answer that?

A. Yes. I was there off and on when it was being disassembled.

Q. Who removed the covers?

A. Mr. Antippas, and I believe Mr. Le Gros.

Q. Where was the cooler at that time?

(Testimony of Stanley A. Lund.)

A. It was in our office at General Steamship.

Q. When did you last see it in your office?

A. Friday morning.

Q. Did you work on Saturday?

A. No, I did not.

Q. Were you down in your office on Saturday?

A. No, I was not.

Mr. Howard: At this time, if the Court please, I offer this exhibit and would like to make this statement, that we have the testimony in the record of Mr. Antippas last week as to the cooler having been shipped out to him, and I have undertaken to establish by this witness who is on the stand at the present time that this is the cooler that was received in his office, and this is the cooler that the covers were removed from by Mr. Antippas during the last few days of last week.

The Court: What is the history of the article you refer to as having been in that manner identified by [1538] Mr. Antippas.

Mr. Howard: The history?

The Court: The history so far as the testimony shows.

Mr. Howard: So far as the testimony shows, I submit to your Honor that Mr. Antippas testified that he had arranged to have the lubricating oil cooler removed from the tanker upon its arrival in a Mississippi port, and had arranged to have it shipped to him in Seattle, and in that connection he was testifying as to a pressure stamp on it.

(Testimony of Stanley A. Lund.)

The Court: The shipping papers would, over objection, have to be used to identify the shipment, and then you would have to have someone identify what was shipped at the other end of the line.

Q. Do you have with you any shipping papers on this?

A. I have a waybill that was received.

Mr. Howard: May it please the Court, in order to shorten this as much as possible, I would like at this time to call your Honor's attention to General Admiralty Rule 46-B, reading as follows:

"If an objection to a question propounded to a witness is sustained by the Court, the latter, upon request, shall take and report the evidence in full unless it clearly appears that the evidence is not admissible [1539] on any ground or that the witness is privileged."

That rule, if the Court please, applies according to its term to a question propounded to a witness, but I submit the same would be true insofar as an exhibit is concerned as would be true of the verbal testimony of a witness.

I make that statement at this time only in an effort to shorten the argument, as far as the admissibility of this particular exhibit is concerned.

The Court: You may proceed to prove the shipping documents.

Mr. Howard: I would like to have this document marked for identification.

1705

12322

15766 Q-30

DEFENDANT EXHIBIT Special

NORTHWEST AIRLINES, Inc.

UNIFORM AIRBILL
NON-NEGOTIABLE

DOMESTIC AIR FREIGHT SERVICE

AIRBILL NUMBER (INSERTED BY CARRIER) 12 06 378 1175 60PT

FROM (CONSIGNOR)

CONSIGNOR'S STREET ADDRESS

CITY ZONE STATE
KNOXVILLE, TENNESSEE

BY X

CONSIGNOR'S NO.

TO (CONSIGNEE) GENERAL STEAMSHIP CO. MR. S. A. LUKE

CONSIGNEE'S STREET ADDRESS 1211 - 4 th AVE.

CITY ZONE STATE
SEATTLE, WASHINGTON

DESTINATION AIRPORT (CITY)

CONSIGNEE'S NO.

DECLARED VALUE Agreed and understood to be not more than the value stated in the governing tariff for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon.
$

ROUTING: ☐ SHIPPER'S ☐ AIRLINE

RECEIVED BY CARRIER AT (CHECK ONE) ☐ CONSIGNOR'S DOOR ☐ CITY TERMINAL ☐ AIRPORT TERMINAL

CHARGES (CHECK ONE) ☒ COLLECT ☐ PREPAID

DELIVERY Will be made to the Consignee at points where delivery service is available unless otherwise specified below. ☐ CITY TERMINAL ☐ AIRPORT TERMINAL

No. OF PIECES	DESCRIPTION OF PIECES AND CONTENTS	WEIGHT	RATE	CHARGES
1	WOODEN BOX MACHINERY	156		
	Shipper 60PT			
	INSTRUCTIONS TO CARRIER			

IMPORTANT. Write or print clearly. Carrier will complete all items below bold line, EXCEPT CONSIGNOR'S C. O. D. fee. Weights are subject to correction.

DIMENSIONS

DIMENSIONAL WEIGHT

_____ X _____ X _____ = _____ Cu. In. =

$_____ RECEIVED TO APPLY IN PRE-PAYMENT OF THE CHARGES ON THE PROPERTY DESCRIBED HEREON.

BY _____ AGENT

It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing classifications and tariffs in effect as of the date hereof which are filed in accordance with law. Said classifications and tariffs, copies of which are available for inspection by the parties hereto, are hereby incorporated into and made part of this contract.

RECEIVED BY
DELTA AIRLINES
AGENT (NAME OF AIR CARRIER)

AT (DESIGNATION OF RECEIVING POINT) KNOXVILLE TENNESSEE

DATE TIME

Form AC-1 (8)

SUMMARY OF CHARGES	PREPAID CHARGES		COLLECT CHARGES	
Weight - Rate Charges			41	27
Pick-up Charges				
Delivery Charges			1	10
Excess Value Transportation Charge				
Sub-Total			42	37
Transportation Tax			1	27
Charges Advanced				
Consignor's C.O.D.	XX	XX		
C. O. D. Fee				
Insurance Charge			XX	XX
TOTAL CHARGES			43	64

☐ CASH ☐ CHARGE

RATES O.K. ☐ CLASSIFICATION O.K. ☐ APPROVED A.M. P.M.

Merritt-Sevarance & Burney

Claim 156

(Testimony of Stanley A. Lund.)

(Air bill marked Respondent's Exhibit A-30 for Identification.)

Q. Handing you what has been marked for identification as Respondent's Exhibit A-30, can you state what that is?

A. That was the air bill that was handed me at the time this crated exchange cooler here was brought to the office.

Q. What item is shown as being the unit transported on that?

A. One wooden box machinery, and the weight.

Q. What is the origin of shipment shown on that [1540] waybill?

Mr. Hokanson: I object to that, your Honor.

The Court: Sustained. The exhibit is not in evidence; therefore, its contents cannot be stated.

Q. Please refer to the rubber stamp endorsement at the bottom of Identification A-30. Was that on the document at the time it was received?

Mr. Hokanson: I object to that. He hasn't identified this yet. It is not in evidence.

The Court: He has not read it in evidence, and the objection is overruled. He can say whether the figure or word, without reading the figure or word, was on there at the time in question.

A. Are you referring to our stamp that has been placed on it?

Q. Yes.

A. That was placed on there subsequent to the time we received it.

(Testimony of Stanley A. Lund.)

Mr. Howard: I offer Identification A-30.

Mr. Hokanson: I object to the introduction of A-30, Your Honor, on the ground that it has not been established what the document represents, nor has it been in any way identified with any of the issues in this case.

The Court: The Court thinks it has not [1541] been properly authenticated, neither 30 nor 29, and the objection is sustained.

Q. Does Identification A-30 represent the waybill that was delivered to your office at the time this A-29, the piece of machinery, was delivered?

Mr. Hokanson: I object to the question as leading, and involving hearsay statement.

The Court: That is sustained. It is leading.

Q. When did you receive Identification A-30?

A. It was received at the time this crated piece of machinery was received in the office.

Q. Who delivered it to you?

A. I couldn't tell you who it was. It was a deliveryman, obviously, for Northwest Airlines, and I signed a copy of the receipt of the box when it was delivered.

Q. The machinery identified as A-29 was received at the same time? A. Yes, it was.

Q. Had you received any previous shipment as to the source of this shipment?

A. No, I had not.

Q. Had Mr. Antippas advised you that any such shipment was being received?

(Testimony of Stanley A. Lund.)

Mr. Hokanson: I object to that, Your Honor.

The Court: Sustained. [1542]

Q. Had Mr. Antippas made any arrangements with you to receive any freight shipments, air freight shipments?

Mr. Hokanson: I object to that as leading and not in any way identified with the exhibit in his hand.

Mr. Howard: He can answer that question yes or no.

The Court: You may do so. The objection is overruled.

The Witness: Yes, he did.

Q. What arrangements had he made with you?

A. I believe it was about a week ago last Saturday. He told me that he had——

Mr. Hokanson: The same objection, for the record. I object to the witness stating what Mr. Antippas told him as based upon hearsay, if what he proposes to state is offered for the proof of the truth of the matter asserted.

Mr. Howard: I submit to Your Honor that the statement Mr. Antippas may have made to Mr. Lund as to arrangements for receipt of any shipment, air freight or otherwise, would be admissible, not necessarily for the proof of the truth of the matter asserted, but to show the source of this Identification A-30 and the arrangements that were made for its receipt in Seattle.

(Testimony of Stanley A. Lund.)

Mr. Hokanson: That is the very thing in issue, Your Honor. [1543]

The Court: The objection is sustained.

I do not see how you are going to establish this Exhibit A-29 unless you produce a witness who knows it came off this vessel.

Mr. Howard: I submit the witness that testified last week testified that such a cooler was received from the vessel, and this witness is brought merely for the purpose of tying it in with the exhibit which was brought into the courtroom, being the same one that the witness testified about last week.

The Court: I am talking about the situation over objection. Since the Court is confronted with an objection here, for all that has been made to appear there may have been more than one shipment made off that vessel of some piece of machinery. There is no definite connection between the Harrison oil cooler, if any, taken from the Urania and the article that is now marked Respondent's Exhibit A-29 and here presented.

Q. I will ask the witness, if I may do so, did you receive any other shipments of machinery during the last week or ten days in your office in Seattle, Washington? A. No, we have not.

Q. If such shipments had been received, would you have any knowledge of them?

A. I might and I might not; I couldn't say.

Q. Were you handling the affairs for Mr. Antippas while he was in Seattle in the last week or ten days?

(Testimony of Stanley A. Lund.)

Mr. Hokanson: I object to the question as leading.

The Court: The objection is overruled.

A. Yes, I did.

Q. Then if any shipments had been received for the account of Mr. Antippas, would you have knowledge of them? A. Oh, yes indeed.

Mr. Hokanson: I object to that, Your Honor, as calling for a conclusion of the witness.

The Court: The objection is overruled.

Q. Were any such shipments received?

A. No.

Q. This Identification A-29, then, represents the only shipment of machinery that you did receive at your Seattle office during the last week or ten days? A. Yes, it is.

Mr. Hokanson: At this point, with reference to the attempt to introduce this exhibit into evidence, I would like to call the Court's attention to an order which the Court signed on the 9th day of March, 1949, in this cause wherein on Page 3 of the order, the cross libelants are directed under paragraph 2:

"To produce each of the following objects at the offices of its proctors, Messrs. Merritt, Summers & Bucey, [1545] 840 Central Building, Seattle, Washington, on or before the 14th day of March, 1949, and to permit libelants-cross-respondents, their proc-

(Testimony of Stanley A. Lund.)

tors, technical advisers and/or photographers, to inspect and photograph each of said objects:

"(a) Any and all engine parts or other parts of the Motor Tanker "Urania" removed from said vessel after October 15, 1948, for the purposes of introducing the same into evidence as exhibits upon the trial of the above entitled cause."

I submit that had counsel intended to introduce this exhibit in this cause, he was under obligation to allow us the opportunity to inspect this under the terms of this order, and that it is improper at this late stage of the trial to undertake identification and introduction of it.

Our witnesses have all been dismissed. This matter was gone over when Mr. Antippas was here. He had an opportunity when he was here to identify it. We were never given the opportunity to see the exhibit. We were informed that it was allegedly here—the alleged cooler was here at about ten minutes of twelve on Thursday, just prior to the resting of cross libelants case. [1546]

No offer was made to produce it at the time we undertook to introduce a cooler in lieu of it to establish the type of construction; and I submit, Your Honor, that it is rather late in the case now, particularly in view of the order signed, to undertake to introduce what is alleged to be the cooler from the Urania, which in any case must be hearsay, because there is not present, to my knowledge, anyone from the vessel to establish that is the

(Testimony of Stanley A. Lund.)

cooler which is in issue here which was on this vessel in October, 1948, and has been on the vessel at all times since.

The proof is such that I submit counsel is wasting the Court's time in undertaking to identify it now.

Mr. Howard: If the Court please, as to the order counsel has referred to, I would like to state to Your Honor that to the best of my knowledge, no such part was available from the tanker Urania at the time that the order was entered.

However, it is true that when another heat exchanger was offered in evidence and identified as an exhibit the latter part of last week, I advised counsel at that time we had the heat exchanger off the Urania in Seattle; that we considered offering it on our case in chief; that we decided against it for several reasons, including the one that was mentioned as [1547] far as the difficulty of incorporating such an exhibit into the record on appeal. Counsel for the cross respondents have not requested any opportunity to examine the cooler since that time, when I advised the Court and counsel that we had such an exhibit in Seattle.

As far as the admissibility of it is concerned, and counsel's last remarks, I can only state I believe it is entirely proper as rebuttal evidence for the reasons that I have previously mentioned to the Court, and we do submit to Your Honor that we have made a prima facie showing of the iden-

(Testimony of Stanley A. Lund.)

tity of the cooler which should be sufficient to allow the Court to receive it in evidence on the offer which we now make of A-29.

The Court: I do not think that the exhibit has been sufficiently identified to be admitted over objection.

One reason I think it is lacking in identification necessary to meet the objection is that it should have had some person who took it from the Urania, identified the identity of it with the identity of the article shipped by the carrier which is alleged to have carried it, and then the identity should have been unmistakably and properly connected up from the time it was on the vessel until it arrived here in court, when it did arrive. [1548]

I do not thnk, over objection, that that has been sufficiently done.

I also feel the possibility of there being some prejudice to the cross respondents in connection with it. I think if it had been produced in accordance with the Court's order in the proper time and at a time when they could make use of and gain information from it, they might have had an opportunity to have made a more timely inspection of it.

That last observation causes the Court to feel that the possible prejudice to the cross respondents makes it important for the Court to require, since the objection has been made by cross respondents, that the exhibit be properly and legally identified.

The objections of cross respondents to the identification of A-29 is and are sustained.

(Testimony of Stanley A. Lund.)

Mr. Howard: If the Court please, would you allow an exception on that ruling?

The Court: Exception allowed.

Mr. Howard: At this time, I will also offer Respondent's Exhibit A-30 for Identification in support of the offer which has heretofore been made on A-29.

Mr. Hokanson: I object to the offer.

The Court: Sustained.

Mr. Howard: An exception, if the Court [1549] please.

The Court: Allowed.

Mr. Howard: At this time, I again renew my application on behalf of cross libelant that this evidence be received in the record under Admiralty Rule 46-B, over objection that has been made and ruled upon by the Court.

The Court: Will you pass that rule up? I would like to read it.

I would like for counsel for cross respondent to read 46-B and comment upon how it is applicable. After counsel for cross respondent has read it, I would like for Mr. Howard to restate his conception of the applicability of that rule to what is here involved.

Mr. Howard: It is my impression that Rule 46-B would be applicable in this case to permit the offer and admission of Exhibit A-29 over objection for the purpose of having it in the record in the event an appeal is taken; the exhibit would be before the

(Testimony of Stanley A. Lund.)

Circuit Court of Appeals if they should rule that the exhibit was properly admissible.

The Court: I would be glad to order that the exhibit go on appeal in case an appeal is taken, if that is what you wish. I think that refers to the testimony connected with the identifying of the exhibit, and, of course, that will be in the transcript of the record in [1550] case there is a review.

Mr. Howard: I believe the rule is intended and will properly be construed as being broad enough to cover the exhibit itself, but that is the purpose of my offer.

The Court: I will be glad to cross that bridge when we come to it.

Mr. Howard: No further examination of this witness.

Mr. Hokanson: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Howard: That concludes the rebuttal of the cross libelant.

The Court: As I understand it, libelant rests, is that right?

Mr. Hokanson: Yes, Your Honor.

The Court: And also the cross respondents rest, is that true?

Mr. Hokanson: That is correct, Your Honor.

The Court: Is there any further testimony to be taken in this case?

Mr. Howard: None on behalf of cross libelant.

Mr. Hokanson: Not on behalf of libelants.

The Court: The court is recessed for five minutes. [1551]

(Recess.)

(Argument presented to the Court by respective counsel for libelants and respondent.)

The Court: All of the original contract items, as I understand it, are undisputed so far as the work done and the charges made therefor are concerned, with the exception of certain substituted work.

The respondent frankly observed in the course of argument on the merits that the extent of Mr. Williams' authority to represent the owner of the vessel is perhaps the one outstanding question for determination by the Court, at least so far as the right of the libelants to recover on account of the matters and things alleged in the libel may be concerned. The Court has heard and carefully considered all of the testimony upon that issue, as well as all the other issues in the case.

I know of no fact in the case more firmly established than that Mr. Williams was held out by the owner as having authority to represent the owner in all things concerning the work and the ordering of extra repairs not [1552] covered by the original contract. So far as concerns the owner advising the libelants that there was any limitation of any character upon the authority of Mr. Williams to repre-

sent the owner, there is no credible evidence in this case to support that.

The owner, through the testmony of Mr. Antippas, put forward a contention in effect that the libelants should have been aware of the fact that in some special matters, Mr. Williams could not have been supposed to have authority from the owners to cover his handling of those matters and acting for the owner to the same extent that the owner through some corporate official could have acted, but there is nothing in the evidence to warrant any such contention on the part of the owner.

Mr. Williams was sent here to represent the owner, and he did represent the owner in everything that concerned the doing of this work and the acts that were reasonably connected with it. No acts done by Mr. Williams for the owner were ever repudiated until after this libel was filed. The Court, therefore, finds, concludes and decides from a preponderance of the evidence that the authority of Mr. Williams to represent and bind the owner was without limitation so far as the matters and things alleged in the libel are concerned.

In every instance of Mr. Williams' approval of work [1553] done and in every instance of acts done by Mr. Williams in connection with the repairs and work on the "Urania," Mr. Williams' authority to bind the owner was ample and sufficient, and Mr. Williams' acts, both as to original contract items and extra items, did bind the owner of the "Urania."

He had every appearance of having unlimited authority to represent the owner in approving the work and authorizing extras in every instance when he purported to act for the owner. If there was in fact in the owner's mind any thought of limitation of such authority, it was incumbent upon the owner to so advise the libelants in some certain way. No such limitation was ever communicated to the libelants.

The Court, from a preponderance of the evidence, further finds, concludes and decides that all of the work which was done in pursuance of the original contract and in connection wth the extras ordered by Mr. Williams was actually done as alleged in the libel, was authoritatively approved by Mr. Williams on behalf of the owner as alleged in the libel, and that the charges made by libelants therefor are in all respects reasonable, and libelants are entitled to recover of and from the respondent all of the sums as prayed for in the libel.

The substitute work was done in place of the item [1554] in the contract calling for removal of a bulkhead at a cost of $200. Mr. Williams himself testified that although the bulkhead was not removed according to the specifications, additional substitute work was done in amount and value satisfactory to him, and, therefore, there will be no deduction from the sums asked for by libelants on account of that $200 bulkhead removal item.

Referring now to the extra coils for the Clayton

boiler, Mr. Featherstone, one of the libelants, clearly recalled the transactions regarding that mattter when he spoke of not having any of those extra coils at the Winslow yard and of having some of them in libelants' Seattle warehouse where the libelants ordinarily kept spare parts used in ship repairs, when he spoke of having the extra coils looked over carefully and of having selected one set that was regarded as suitable for the Clayton boiler on the "Urania," and of having that extra set transported from Seattle over to the Winslow yard and there put aboard the "Urania." It is not likely that Mr. Featherstone would have had that done without any authorization from Mr. Williams. Mr. Featherstone's recollection of the foregoing details concerning the extra coils is significant.

It is more likely that Mr. Williams has forgotten the detail. The Court declines to allow any deductions from the amounts to be recovered by libelants on account of [1555] the work substituted for the bulkhead removal and extra coils for the Clayton boiler.

Mr. Williams was on the job a great percentage of the time, and he worked without any evidence of friction with the superintendents and the foremen and workmen in and about the yard, and so far as the evidence discloses, there never were any irreconcilable differences between him and others working in the yard as to the amount or quality of the work called for by the original contract or the extra job orders.

The Court was convinced more by the testimony of Mr. Williams than by any other testimony, as to the fairness of these items, respecting both the quantity and prices of materials and work furnished by libelants. Particularly, his testimony in effect that the repair job as a whole was done in a good workmanlike manner caused the Court to conclude that the libelants did supply good materials and good shipyard work in connection with all the repairs made.

This the Court so concludes notwithstanding the fact that some of the shipyard foremen or subforemen failed to relate from the witness stand very clear-cut narratives or accounts of what was done, or definite personal knowledge of details of the work actually done. In at least three instances, I thought libelants' witnesses showed a surprising lack of personal recollection of the details of [1556] the work done.

Yet, I am convinced, from a consideration of all the evidence and by a preponderance thereof, that one of the reasons why some of these foremen or subforemen may not have retained in their minds in minute detail what they personally did or saw done in connection with the repairs, was that they were doing so much of the work under direction of ship officers or personnel, notably the chief engineer or persons in the engine room department, and they were doing the work in detail as ordered

rather than in accordance with written specifications or what the foremen or subforemen thought should be done. Consequently, in such instances, the final functioning of a repaired unit was not to be so much in accordance with the satisfaction of a foreman or subforeman, but was to be rather for the approval of Mr. Williams and Mr. Gallagher or as required by a department of the ship or its head particularly interested in the specific item.

Coming now to the cross libel, it appears from the allegations of the cross libel and testimony in support thereof that as a matter of fact the cross libelant, the owner of the vessel, sustained considerable expenses in California and Mexican waters and ports due to a failure of the main engine, and more specifically, due to the galling of the vertical timing gears of the main engine. As to [1557] cross libelant's right to recover on account of the matters and things set forth in the cross libel, the burden rests upon the cross libelant to prove as alleged that such engine failures were caused by faulty repairs made by libelant.

So far as the main engine and its auxiliary equipment are concerned, all parts operated efficiently from the time of the beginning of the sea trial at Seattle until the vessel arrived off Manzanillo, Mexico, more than eleven days later. The sea trial was had before the vessel departed from Seattle. The occurrence of the main engine's failure off

Manzanillo was about eleven days after the vessel left Seattle.

The engine functioned properly for ten days. The main engine failure first cocurred on the eleventh day out of Seattle and about a day after the lubricating oil was changed. No difficulty in the functioning of the engine or any of its auxiliary equipment had been experienced during the sea trial or at any time during those ten days out of Seattle before the lubricating oil was changed. The Court is not entirely convinced by the evidence as to just exactly what was the cause of that engine trouble or of the galling of those gears, but I am convinced of one thing, and that is, of the failure of the cross libelant to sustain the burden of showing, by a preponderance of the evidence, just what the cause was. [1558]

I am not entirely satisfied in my own mind from the evidence whether or not there actually was contamination in the lubricating oil. If it is established by the evidence that lube oil contamination of some kind or other was the cause, I am not entirely satisfied as to the nature of the contamination, whether it was sea water or whether it was some foreign matter other than sea water which had been introduced into the lubricating oil.

Furthermore, I am not satisfied from the evidence as to what was the means of introducing the foreign matter, either sea water or other kind of contamination, if there was some kind of contamination, into the lubricating oil. If there was sea water con-

tamination, I am not sure whether it all was admitted through leaks or whether it was admitted in some other way.

Cross libelant contends and it might be supposed that a leak in the partition wall between the sea water cooling agent and the lube oil admitted the sea water into the lube oil, but I do not know from the evidence certainly that the leaks, if any, were caused by any defective repair work done at Seattle. If the leaks did in fact admit the sea water, the leaks might have developed from ordinary wear and tear after the vessel left Seattle, instead of from faulty repairs at Seattle.

One witness testified that the chief engineer [1559] definitely instructed just what was to be done, what kind of work, servicing and testing were to be done with respect to the heat exchangers and lube oil cooler, and that the libelants as repairmen undertook on their own responsibility no duty to determine the extent of repairs or servicing or testing which was to be done, but did only what the chief engineer specifically directed in pursuance of the contract stipulation in that connection.

Also, I do not think that it is to be concluded from the evidence before the Court here that the galling of the gears was not caused in part by some abnormal pressures not connected with the repairs. There is considerable uncertainty about what might have caused the galling of the gears, but one of the outstanding circumstances surrounding the problem is a circumstance very strongly in

favor of the workmanlike quality of the repairs made at Seattle, namely, that the engine and its auxiliary parts functioned normally and satisfactorily, not only at the time of the sea trial, when Mr. Williams, on behalf of the owner, and also Mr. Gallagher, on behalf of the American Bureau of Shipping, approved the repair work, but also during the ten days' run from Seattle to a point off Manzanillo, during all of which time there was no evidence of improper functioning of either the main engine or its timing gears, but on the contrary, such functioning was proper. [1560]

No one can decisively conclude from the evidence in this case that such damage or galling as the timing gears sustained might not have all been caused during the day that they were operating after the first change of lubricating oil was made following the initial ten days' run from Seattle.

A substantial portion of all of the repair work done by libelants was done not to the extent and in the manner as determined by the discretion of the libelants, but according to the discretion and direction of those representing the owner of the vessel as the contract provided. In that connection, we should bear in mind the fact that the vessel had been out of use for some time before the repairs were made.

A relatively minor failure or damage occurred near Port Angeles when the telemotor system failed. But the statement on page 6 of Libelants' Exhibit 17, item 41(a) that, "All parts of the steering

engine were examined and were found in good condition," cannot be lightly laid aside, for that is what Mr. Gallagher, as a representative of the American Bureau of Shipping, found from his observation of the telemotor's functioning on the sea trial.

That finding, taken in connection with other testimony in the case, convinces the Court that the work [1561] of repair and servicing of the telemotor system was done in a good workmanlike manner and in accordance with good shipyard practice, and that the failure in that system occurring near Port Angeles was due to causes other than improper work of libelants.

Finally, it is the finding, conclusion and decision of the Court from a preponderance of the evidence in this case that the cross libelant take nothing by the cross libel. It is the further decision of the Court that libelants recover their taxable costs herein. Such recoveries as are allowed by the Court in favor of libelants shall be without interest prior to entry of judgment and decree if such entry can be soon accomplished.

Is there any issue tendered in the libel or cross libel or any answer to either of them not covered by the Court's announced decision? If so, will you advise me of it now?

Mr. Howard: I believe there is one item that was not specifically commented on with respect to the cross libel, the claim for cost of repairs to the Clayton boiler.

The Court: I do not think as to that item, any more than the others, that the cross libelant has sustained its burden of proving the repair work was defective or other than workmanlike in accordance with good shipyard practice, and for that reason the Court does as to that [1562] item specifically deny recovery to the cross libelant.

(At 6:25 o'clock p.m., Monday, April 18, 1949, proceedings closed.)

CERTIFICATE

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing mattter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: No. 12322. United States Court of Appeals for the Ninth Circuit. Compania Naviera Limitada, a Corporation, Claimant of the Motor Tanker "Urania" Her Engines, Tackle, Apparel, Furniture and Equipment, Appellant vs. E. A. Black and J. J. Featherstone, Copartners doing business under the name and style of Commercial Ship Repair, Appellee. Apostles on Appeal. Appeal from

the United States District Court for the Western District of Washington, Northern Division.

Filed August 8, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

E. A. BLACK and J. J. FEATHERSTONE, co-partners doing business under the assumed name and style of Commercial Ship Repair,

Appellees,
(Libelants)

vs.

THE MOTOR TANKER "URANIA," her engines, tackle, apparel, furniture and equipment,

Respondent,

COMPANIA NAVIERA LIMITADA,
a corporation,

Appellant.
(Claimant)

COMPANIA NAVIERA LIMITADA,
a corporation,

Appellant
(Cross Libelant)

vs.

E. A. BLACK and J. J. FEATHERSTONE, co-partners doing business under the assumed name and style of Commercial Ship Repair,
Appellees
(Cross Respondents).

PETITION TO DISPENSE WITH PRINTING OF CERTAIN EXHIBITS

To The Honorable Judges Of The Above Entitled Court:

Appellant herein, Compania Naviera Limitada, respectfully petitions for an order herein, providing that those certain original exhibits, or portions thereof, constituting a part of the Apostles on Appeal, filed herein, which are set forth on schedule attached hereto and made a part hereof, shall be considered by this court upon the appeal herein without their being printed, and that the printing thereof in said printed Apostles may be dispensed with; for the reasons set forth in affidavit of Charles B. Howard, one of the proctors for appellant, hereto attached and made a part hereof; and all in accordance with Stipulation of proctors for appellant and appellees, dated June 6, 1949, and included in said Apostles; and that said stipulation be approved by this court.

Respectfully submitted,
MERRITT, SUMMERS & BUCEY,
/s/ CHARLES B. HOWARD,
Proctors for said Appellant.

SCHEDULE OF EXHIBITS NOT TO BE PRINTED

Libelants' Exhibits

No. 10: Record of stores issued from stock to "Urania."

Reason for Not Printing: Too voluminous.

No. 11: Invoices on outside purchases for "Urania."

Reason for Not Printing: Too voluminous.

No. 13: Specifications of Sparkman & Stevens for conversion of tanker.

Reason for Not Printing: Too voluminous.

Claimant's Exhibits

No. 4: Specifications of Sparkman & Stevens for conversion of tanker.

Reason for Not Printing: Too voluminous.

No. 8: Pilothouse log book "Urania."

Reason for Not Printing: Not readily printable.

No. 9: Invoices and statements at Manzanillo.

Reason for Not Printing: Too voluminous.

No. 10: Statements of Manzanillo agent.

Reason for Not Printing: Too voluminous.

No. 12: Engineroom log book "Urania."

Reason for Not Printing: Not readily printable.

No. 13: Continuation engineroom log book.

Reason for Not Printing: Not readily printable.

No. 16: Instruction book and manual of Union Diesel Engine Co.

Reason for Not Printing: Too voluminous and major portions not applicable. Pertinent portions referred to in transcript.

No. 24: Invoices and statements at Los Angeles.

Reason for Not Printing: Too voluminous:

No. 29: Lubricating oil cooler (identification only).

Reason for Not Printing: Not printable.

[Title of Court of Appeals and Cause.]

United States of America,
State of Washington,
County of King—ss.

Charles B. Howard, being first duly sworn, on oath deposes and says:

I am a member of the bar of the above entitled court and one of the proctors for appellant in this cause; and make this affidavit on behalf of appellant and in support of the foregoing petition of appellant to dispense with the printing of certain exhibits.

The exhibits shown on schedule attached to the foregoing petition include log books, manuals, numerous invoices, accounting records too vluminous to print, large portions of which have slight, if any, bearing on a determination of the issues in this cause.

The claimant's Exhibit 29, being a lubricating oil cooler which was offered but denied admission in evidence by the trial court, is a heavy piece of machinery which it is impossible to reproduce in the printed record and falls within the classification of exhibits of material within the meaning of Rule 18 of the Rules of this court.

Proctors for all parties to this appeal have by written stipulation, included in the Apostles on Appeal, agreed to the consideration of said exhibits on appeal in their original form without reproduction in the printed record; and it is respectfully submitted that it is suitable and proper that said stipulation be approved, and that the foregoing petition be granted.

/s/ CHARLES B. HOWARD.

Subscribed and sworn to before me this 3rd day of August, 1949.

[Seal] /s/ LANE SUMMERS.

Notary Public in and for the State of Washington, residing in Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 9, 1949.

[Title of Court of Appeals and Cause.]

ORDER GRANTING PETITION TO DISPENSE WITH PRINTING OF CERTAIN EXHIBITS

Upon reading and considering the petition and affidavit therefor, filed herein on behalf of appel-

lant, together with the stipulation of appellant and appellees dated June 6, 1949, as included in the Apostles on Appeal herein, it appearing to the Court proper;

It is now Ordered that said petition be and it hereby is granted; that said stipulation be, and it hereby is, approved; and that in accordance with said stipulation those certain items, or portions, of the original exhibits included in said Apostles as set forth in Paragraph (F) of stipulation dated June 6, 1949, and also in schedule attached to petition herein, need not be printed in said Apostles, but shall nevertheless be considered upon said appeal, in their original form.

Done this 9th day of August, 1949.

/s/ WILLIAM DENMAN,
/s/ HOMER BONE,
/s/ WM. E. ORR,
Circuit Judges.

Approved and notice of presentation waived.

TODD, HOKANSON &
WHITE,
/s/ RUSSELL V. HOKANSON,
Proctors for Appellees.

Presented by:

/s/ CHARLES B. HOWARD,
Of Proctors for Appellant.

[Endorsed]: Filed Aug. 9, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PARTS OF THE RECORD

To The Honorable Judges Of The Above Entitled Court:

Appellant herein, Compania Naviera Limitada, of Panama, hereby refers to and adopts as its Statement of Points on which it intends to rely upon this appeal, all of its Assignments of Error as heretofore filed herein.

Said appellant, as its Designation of Parts of the Record, which it deems necessary for consideration on said appeal, does hereby designate all of said Apostles on Appeal, including all of the original pleadings and exhibits, the court reporter's transcript, depositions and other documents, (including all portions of the record specified in appellant's praecipe as incorporated in the said Apostles) excepting only those documents, exhibits and pleadings omitted from the record pursuant to Stipulation as to Record and Apostles on Appeal, signed by all counsel and dated and filed June 6, 1949.

Respectfully submitted,
MERRITT, SUMMERS & BUCEY,
/s/ CHARLES B. HOWARD,
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 9, 1949.

[Title of Court of Appeals and Cause.]

DIRECTIONS TO CLERK RE PRINTING APOSTLES ON APPEAL

To The Honorable Clerk Of The Above Entitled Court:

In harmony with stipulation of counsel of June 6, 1949, included in the Apostles on Appeal in the above entitled cause, (and subject to the order of the above entitled court on appellant's Petition to Dispense with Printing of Certain Exhibits) please omit the portions of the record set forth in paragraph (F) of the stipulation in printing the Apostles on Appeal.

Also, in printing the exhibits, or portions thereof, which are to be printed in said Apostles, and consistent with the Rules of this Court and existing practices of your office, please have each exhibit printed or photostated, and placed in the Apostles immediately after the respective portion of the reporter's transcript showing the introduction (or offer), the proposed location of each exhibit being shown opposite the name and number thereof in the following table:

Claimant's Exhibits

No.	Description	Proposed Printing	Proposed Photostating	Reporter's Typed Transcript After Page	Line
1.	Specifications	All	.....	18	1
2.	Progress Invoice	.....	All	174	5
3.	Letter 9/23/48	All, except letterhead & formal detail	.....	32	15
4.	Additional Specifications	All	.....	79	7
5.	Invoice 10/8/48	All	.....	81	6
6.	Invoice 10/8/48	All, except letterhead & formal detail	.....	82	12
7.	Work Sheet	.....	All	107	6
8.	Survey Report, H. F. Williams	All, except letterhead & formal detail	.....	125	5
12.	Cost Schedule	.....	All	186	10
14.	Diagram of Clayton Boiler	.....	All	691	12
15.	Diagrams of oil cooler	.....	All	984	4
17.	A.B.S. Survey Report	Body of report, date & signatures, omitting formal detail	.....	1496	11

Libelants' Exhibits

No.	Description	Printing Proposed	Proposed Photostating	Reporter's Typed Transcript After Page	Line
1.	Ltr. of E. A. Black	.....	All	52	23
2.	Receipted invoice for $25,000	.....	All	55	6
3.	Telegram dated 10/13/48	Addressee, message, dateline & signature	.....	56	12
5.	Two invoices for additional work	All, except letterhead & formal detail	.....	423	25
6.	Clarke survey of 10/16/48	All	.....	572	16
7.	Clarke survey of 10/18/48	All	.....	578	3
14.	Diagrams(5) of main engine	.....	All	568	23
15.	Invoice, Clayton Mfg. Co.	.....	All	1213	18
17.	Invoices (13 pages)	All, except letterhead & formal detail	.....	722	15
20.	Chemist's analysis oil sample	All, except letterhead & formal detail	.....	916	17
21.	Pike survey report	All	.....	1164	24
22.	Dupuy survey report	All except formal detail	.....	1164	24
23.	Summers survey report	All	.....	1164	24
25.	Towing Invoices	All, except letterhead & formal detail	.....	1162	14
26.	Telegram 10/13/48 (identification)	Addressee, message, dateline & signature	.....	1180	13
27.	Invoice	All except formal detail	.....	1219	13
28.	Charter (identification)	.....	All	1219	18
30.	Air freight bill (identification)	.....	All	1540	16

Respectfully submitted,
MERRITT, SUMMERS &
BUCEY,
/s/ CHARLES B. HOWARD,
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 9, 1949.

No. 12322

In The United States Court of Appeals
For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment,

Appellant,

vs.

E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

MERRITT, SUMMERS & BUCEY,
LANE SUMMERS,
CHARLES B. HOWARD,
Proctors for Appellant.
840 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 12322

In The United States Court of Appeals

For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment,

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vs.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

MERRITT, SUMMERS & BUCEY,
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THE ARGUS PRESS, SEATTLE

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In The United States Court of Appeals
For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment, *Appellant*, vs. E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair, *Appellee*.	No. 12322

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

This action was commenced by a libel in rem (Aps. 2) in admiralty filed in the District Court at Seattle against the respondent Motor Tanker "Urania," owned by appellant. The appellees as libelants sought to recover a sum of money alleged to represent the unpaid balance due and owing for material, labor and services furnished in connection with the overhaul and repair of the "Urania" at appellees' shipyard near Seattle.

Appellant filed answer to the libel (Aps. 15) and cross-libel against appellees (Aps. 18). Appellant alleges in the cross-libel that it is entitled to recover a

sum of money as damages representing losses sustained and expenses incurred as a result of appellees' nonperformance or malperformance of their contract obligations with respect to repairs, renewals and additions to the vessel.

Jurisdiction of the District Court is based upon Title 28 U.S. Code, Section 1333, which provides for original jurisdiction of any civil cause of admiralty or maritime jurisdiction in the District Courts of the United States. Final Decree (Aps. 90) was entered by the District Court in favor of appellees on their libel and against the appellant on its cross-libel.

This appeal is from such Final Decree. Jurisdiction of this Court is based upon Title 28 U.S. Code, Section 1292, which provides that the Courts of Appeals shall have jurisdiction of all appeals from final decisions of the District Courts of the United States.

STATEMENT OF CASE

The Motor Tanker "Urania" is a vessel of 165-foot over-all length, 32-foot beam and 15-foot depth, powered by a 560-horsepower diesel engine built by Union Diesel Engine Company, Oakland, California. It has eight cargo tanks designed to carry various types of liquid cargoes. The "Urania" was built for the U. S. Navy and was purchased by appellant on August 4, 1948, at Seattle (Aps. 476).

The appellant, a Panamanian corporation, as owner, registered the "Urania" under the Panamanian flag and a crew of 17 officers and men were provided for its operation, under command of Andreas Beis as

Master and Panaiotis Baxevanis as Chief Engineer (Aps. 477-478).

Demetri Antippas, a director and technical adviser of the appellant corporation, and a graduate of Athens College, Durham University (England) and Massachusetts Institute of Technology, in naval architecture and marine engineering (Aps. 474-475), came to Seattle about August 2, 1948, to consummate the purchase of the "Urania" and arrange for repairs and alterations to the vessel to adapt her for carrying commercial cargoes. Harry F. Williams of New York also came to Seattle to assist Antippas in this work. Williams had been employed from time to time by appellant as a port engineer (Aps. 479).

Certain specifications had been obtained by appellant in New York for extensive modification and conversion of the "Urania" type of vessel. Through appellant's agents at Seattle, quotations or bids were obtained for performing certain of the work set forth in the specifications (Aps. 480-482). Appellees, doing business as Commercial Ship Repair (Aps. 170), submitted a bid of $39,780.00 (Respondent's Exhibit A-1; Aps. 228), which provided for completion of the specified work in eighteen (18) working days. Appellees' bid was not the low bid (Aps. 173, 482), but was finally accepted by appellant after some further negotiation and adjustment as to items of work and prices, the agreed price then being $40,155.00 plus $1500.00 if certain additional work was ordered performed (Aps. 196, 484-486).

Demetri Antippas left for New York the same night

that appellees' bid was accepted (Aps. 489). Harry F. Williams remained at Seattle to oversee and supervise the work for appellant (Aps. 323, 486-487). The extent of Williams' authority to bind appellant as to additional work and prices for work performed by appellees on the "Urania" was an issue having a direct bearing upon the appellees' right to recover for the full balance alleged to have been due for repairs and alterations after giving credit for $25,000.00 voluntarily paid by appellant to appellees on account during the course of the work (Aps. 491-493).

While the "Urania" was at appellees' shipyard during August, September and October, 1948, certain additional work was performed on the vessel by appellees at the request of Harry F. Williams (Aps. 251; listed on libelants' Exhibits No. 4, Aps. 254; and No. 7, Aps. 312). This additional work included cleaning, testing and repair of the lubricating oil cooler on the main engine (Item No. 1, Libelants' Exhibit No. 4, Aps. 257, 1445) and repair of Clayton heating boiler (Item No. 14, Libelants' Exhibit No. 4, Aps. 262).

In performing the specified work on the lubricating oil cooler, workmen from appellees' repair yard went aboard the vessel and removed the cooler to the appellees' pipe shop (Aps. 716, 1446) where one of appellees' workmen testified that, after cleaning, a 50-pound pressure test was applied to each end of the cooler by attaching a water hose to the cooler piping (Aps. 1439). No leaks were found (Aps. 1458), and no repairs were made on the oil cooler in the shop, other than installing new gaskets and new zinc pencils

in the unit (Aps. 1441, 1449). All of the work on the lubricating oil cooler was done by appellees' workmen without participation by members of the crew (Aps. 716, 738-9).

A Clayton heating boiler was installed aboard the "Urania" for purposes of furnishing steam heat to crew's quarters and in the heating coils of the cargo tanks. Appellees' workmen removed the pump unit of the Clayton boiler from the ship to the shops ashore for overhaul under the extra work contract (Item No. 14, Libelants' Exhibit No. 4, Aps. 262). The pump unit was dismantled, parts renewed and reassembled (Aps. 1475). After reinstallation by appellees aboard the "Urania" it failed to function properly, necessitating corrective repairs at Seattle (Aps. 759) and at Los Angeles (Aps. 825). The details of this work and appellant's charges of malperformance against appellees on this damage will be discussed later in this brief.

The vessel's telemotor steering engine and controls were tested by appellees under the original fixed price contract (Item 26 of Libelants' Exhibit No. 1, Aps. 186), and appellees reported the same to be in good running order after oiling and adjusting the parts (Aps. 1472-4).

The "Urania" departed from the appellees' shipyard on Puget Sound, after repairs and alterations were completed, on October 16, 1948 (Aps. 656), to proceed in ballast to the Panama Canal for further orders (Aps. 655). Within a few hours of departure, the vessel's telemotor steering gear broke down, necessitating use of emergency steering gear until the

vessel reached Port Angeles on the morning of October 16, 1948 (Aps. 656). Through the shipowner's Seattle agents, arrangements were made to fly repairmen from appellees' shipyard to Port Angeles, where repairs were made to the steering system and the vessel resumed its voyage on the evening of Octobr 16 (Aps. 657).

While en route to the Panama Canal, and while off the west coast of Mexico on October 26, difficulty was experienced with the operation of the main engine, eventually resulting in the master deviating from his course to the nearest port, Manzanillo, Mexico, arriving on October 28, to enable emergency repairs to be made on the main engine (Aps. 660-661, 729).

A service engineer employed by the manufacturer of the main engine was, at appellant's request, flown from Oakland, California, to Manzanillo with spare parts to effect repairs (Aps. 896, 985). Practically no repair facilities were available ashore at the port of Manzanillo (Aps. 992). The service engineer checked alignment of engine parts, made adjustments, and replaced certain vertical shaft gears which he found badly worn, scuffed and galled (Aps. 986). With the service engineer aboard, the "Urania" departed from Manzanillo to return to Los Angeles where it was contemplated that more complete repairs would be made (Aps. 996). After being under way approximately 36 hours the main engine failed to function properly, necessitating a call for assistance of a salvage tug, which towed the vessel into Los Angeles, where it arrived on November 11, 1948 (Aps. 662-3, 1008-9).

At Los Angeles, surveyors for the American Bureau of Shipping (Aps. 1145) and for Lloyds Underwriters (Aps. 1203), owner's appointed surveyor (Aps. 1242), and representatives of the main engine manufacturer (Aps. 892-895, 1009-1015, 1088-97), examined the main engine of the "Urania." The lubricating oil cooler was removed from the engine and tested ashore (Aps. 1121-1123). It was then discovered that certain leaks existed in the soldered seam separating the core from the casing of the cooler (Aps. 1097-1101, 1124-1125 and Libelants' Exhibit 15, Aps. 1143).

The oil passing through tubing in this lubricating oil cooler from the main engine is cooled by salt water passing through jackets in the cooler, similar to the functioning of a radiator on an automobile, except that sea water is used as a coolant instead of air (Aps. 876-7).

The above mentioned surveyors and engine manufacturer's representatives testified that the infiltration of salt water coolant through the leaks into the lubricating oil in the cooler caused a contamination of the oil, resulting in the galling and wearing of the gears that eventually failed in the main engine of the vessel (Aps. 1212-13, 1267-69, 1273, 1283). These qualified expert witnesses, who examined the engine personally upon arrival of the vessel at Los Angeles, expressed the opinion that this leakage of salt water in the lubricating oil cooler, resulting in contamination of the oil, was the cause of the main engine breakdown (Aps. 913, 934, 948, 950-51, 962, 972, 1212-13, 1267-69, 1283).

After repairs to the main engine, auxiliaries and other parts of the vessel were completed at Long Beach, the vessel was tested on a sea trial and found to operate satisfactorily (Aps. 1160-61). The vessel departed from Los Angeles on November 17 and resumed voyage to the Panama Canal with the service engineer for the main engine manufacturer aboard (Aps. 745). The main engine functioned satisfactorily en route, hence the service engineer was disembarked at Manzanillo, Mexico, on November 23 (Aps. 1019-20, and Respondent's Exhibit A-8, in original form per stipulation and order, Aps. 1729-33). The vessel proceeded to its destination without further difficulty with the main engine (Aps. 745-6).

The various elements of damage claimed by appellant under the cross-libel (Aps. 18) fall within the following general categories:

(a) Cost of corrective repairs;
(b) Towing charges after breakdown;
(c) Operation expense on vessel during periods of deviation and delay for repairs;
(d) Loss of profits during periods of deviation and delay; and
(e) Miscellaneous incidental expenses, including additional fuel consumed.

The total amount claimed in the cross-libel as amended (Aps. 166-67) was the sum of $36,329.37. Further reductions and eliminations have reduced the amount now claimed by appellant on this appeal to the sum of $25,219.41 as set forth in detail later in this brief under Damages.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON BY APPELLANT

Appellant relies on Assignments of Errors numbered 6, 7, 8, 9, 10, 12 and 13 (Aps. 117-127). Because of the length of these Assignments of Errors they are printed herein as an appendix to the brief, and are summarized in each case before the argument addressed to the particular assignment of error.

In essence, the Assignments of Error relied upon by appellant relate only to its right to recover from appellees on the cross-libel for the various elements of damage caused by the breakdowns and delays to the "Urania" due to nonperformance or malperformance of appellees' contractual obligations with respect to repairs, renewals, alterations and additions to the vessel.

ARGUMENT

Since this case is in admiralty, "an appeal opens the case for a trial *de novo*." *Maui-Absaroka* (9 CCA) 1945 A.M.C. 767, 771, 149 F.2d 295. In such circumstances this Court has held that there is a "rebuttable '*prima facie*' presumption that the findings of the District Court are correct." *Eureka-Ernest H. Meyer* (9 CCA) 1936 A.M.C. 1179, 1187, 84 F.2d 496. But this Court has always recognized that the value of this presumption, and the weight given to it, is lessened where some of the witnesses testify in person before the District Court and some of the testimony is given by deposition. *Maui-Absaroka, supra; U.S.A. v. Lubinski* (9 CCA) 1946 A.M.C. 483, 486, 153 F.2d 1013; *Johnson, Adm. v. Griffiths S.S. Co.* (9 CCA)

1945 A.M.C. 887, 889, 150 F.2d 224. Thus, in *Eureka-Ernest H. Meyer, supra*, this court stated:

> "It is obvious that where the testimony is in part in deposition and in part heard by the court, and the conflict is between the heard and unheard witnesses, there cannot be a balancing of credibility between the two. In such a case and where all or substantially all of the evidence pertinent to the finding is given by deposition the presumption is of lesser weight and more easily may be rebutted. *Natal* (9 CCA) 1926 A. M.C. 1235, 14 F.2d 382, 384."
>
> *Eureka-Ernest H. Meyer* (9 CCA) 1936 A.M.C. 1179, 1187.

This rule becomes particularly important on this appeal when it is realized that eleven witnesses called by appellant to establish the nature and cause of the breakdowns on the vessel all testified by deposition. They were men experienced in the field of marine engineering or related activities, of unquestioned ability and credibility, and they testified as to facts and opinions based on their own personal observations and findings aboard the "Urania" after the breakdowns crippled the ship on its first voyage. Their testimony, even though by deposition, is entitled to great weight as opposed to the mere opinions of appellees' witnesses based on hypothetical questions. Furthermore, most of appellees' witnesses fall within the category of interested witnesses by reason of direct connection with appellees through employment or business relationship.

Again, as to the findings of the trial judge, this Court has not hesitated, in determining appeals in

admiralty cases, to reject the findings of the trial court when not supported by the evidence. *The Wildwood* (9 CCA) 1943 A.M.C. 320, 326, 133 F.2d 765; *Johnson, Adm. v. Griffiths S.S. Co.* (9 CCA) *supra*, and *Maui-Absaroka, supra.*

This appeal involves primarily a question of fact, which in turn requires a careful analysis of the testimony relating to the nature of repairs made by appellees before departure of the ship, together with testimony as to the findings of the surveyor and others who boarded the ship and inspected the various parts of machinery upon arrival of the "Urania" at Port Angeles, Manzanillo and Los Angeles after breakdowns.

Clarity of understanding suggests discussion under three principal headings:

First, the main engine breakdowns, involving Assignments of Error numbered 8, 9, 10 and 13;

Second, the failure of the Clayton heating boiler and telemotor steering system, involving Assignments of Error numbered 6, 7 and 13;

Third, various elements of appellant's damages, including assigned error relating to the admission of evidence of loss of profits in operation of the vessel (Assignment of Error 12).

I. Main Engine Breakdown

Under Assignments of Errors 8, 9, 10 and 13 appellant contends its evidence offered in the District Court clearly proved that as the direct result of faulty repairs by the appellees to the main engine a break-

down occurred shortly after the "Urania" left appellees' shipyard.

The "Urania" completed repairs and departed from appellees' shipyard on Puget Sound on October 16, 1948 (Aps. 656). The first breakdown of the main engine occurred at sea on October 26 (Aps. 659), approximately ten days later. This breakdown of the main engine was found by the engine manufacturer's service engineer, who inspected the engine at Manzanillo, Mexico, to be due to a galling and failure of the helical timing gears in the vertical shaft of the main engine, particularly the lower gears (Aps. 986).

The second breakdown occurred at sea on November 5, 1948 (Aps. 1007), after emergency repairs, including replacement of lower vertical shaft gears, had been completed at Manzanillo (Aps. 988) and while the vessel was en route back to Los Angeles for more extensive repairs on the main engine (Aps. 1043, 1062). This second breakdown of the main engine was also found by the service engineer to be due to galling of the same gears (Aps. 1048).

After the "Urania" arrived in Los Angeles (Long Beach) on November 11, it was established by the personal inspection and surveys of the following experienced and disinterested witnesses that the two above mentioned breakdowns were caused by contamination of the lubricating oil with salt water, resulting in galling and failure of the helical timing gears on the vertical shaft of the main engine.

Mr. E. W. Pike, surveyor for the American Bureau of Shipping at Los Angeles (Aps. 1145), conducted a

survey on the main engine. He stated in his testimony by deposition that he found salt water in the lubricating oil (Aps. 1149, 1174). His survey report (Respondent's Exhibit A-21, Aps. 1322) confirms his oral testimony.

Mr. George M. Dupuy, marine surveyor, conducted a survey on the main engine for Lloyds underwriters or Lloyds Agents (Aps. 1208). He stated in testimony by deposition that he found the oil remaining in the crankcase of the main engine to be emulsified "as if it had been contaminated with water" (Aps. 1210) and his Report of Survey (Respondent's Exhibit A-22, Aps. 1324-29) states that he found "evidence of salt water in lube oil system" (Aps. 1326). As to the breakdown, Mr. Dupuy testified by deposition that "in my opinion from the observations I made of it—the cause of it was the contamination of the lube oil system through the leakage of the cooler" (Aps. 1212-13).

Mr. Harry J. Summers, who had been with the American Bureau of Shipping for over thirty years as a principal surveyor, was called to make a survey of the main engine at the request of the Los Angeles agents for the appellant, owner of the vessel (Aps. 1242-43). He testified by deposition that he examined the oil remaining in the crankcase upon arrival of the "Urania" at Los Angeles on November 11 and found water in the oil (Aps. 1249). From samples taken of this mixture of oil and water he determined by tasting that it was salt water mixed with the lube oil (Aps. 1250). He further testified that the "gear failure was the primary cause of the failure of the

operation of the propeller machinery" (Aps. 1267) and that "In my opinion the gears failed because of faulty lubrication rather than misalignment" (Aps. 1269). On cross-examination he stated further "faulty lubrication should cause a galling or spalling of the teeth in the helical gears and the continued spalling and the continued grinding would serve to destroy those gears in a comparatively short length of time after the first failure of any one tooth; that would be my opinion" (Aps. 1283).

Mr. S. W. Newell, vice president of the Union Diesel Engine Company, and a graduate of Webb Institute of Naval Architecture with degree in Naval Architecture and Marine Engineering (Aps. 870-71) testified by deposition that he personally found oil mixed with water in the crankcase of the main engine aboard the "Urania" when he went aboard the vessel on November 12 at Long Beach (Aps. 892-94). He sampled the mixture by tasting and was positive in his analysis that it contained salt water (Aps. 894-95). He later testified: "I believe that the salt water found its way into the lubricating oil through the lubricating oil cooler" (Aps. 934). On cross-examination by appellees' counsel the following question and answer were given (Aps. 950-51):

> "Q. (By Mr. Hokanson): And yet you would say that the contaminated oil, not affecting any other bearings which bear the main weight of the engine nevertheless caused the galling of the timing gears?
>
> A. Yes, that is correct."

The witness then explained his answer by pointing

out that a greater pressure exists on the helical timing gears that failed in the "Urania" engine than exists under the same operating conditions in bearings lubricated from the same source (Aps. 951).

Mr. N. A. Cross, the service engineer for Union Diesel Engine Co., also verified by taste test the finding of salt water in the lube oil in the sump of the main engine upon arrival of the "Urania" in Los Angeles (Aps. 1067). He attributed the salt water in the oil "to the fact that it was coming from the oil cooler" (Aps. 1059).

Mr. M. L. Newell, another service representative for Union Diesel Engine Co. (Aps. 1088) also confirmed that the oil in the crankcase of the "Urania" was contaminated on the day that the vessel arrived at Los Angeles in November (Aps. 1090).

Having established the cause of the two main engine breakdowns by the above witnesses, the appellant then produced testimony which eliminated any other possible cause of the breakdowns.

Thus, S. W. Newell testified that in his opinion, based on his experience with engines of this type and his personal observations, no cause other than the contamination of the oil could possibly have contributed to cause either the first or second breakdown of the main engine (Aps. 948, 972). He also testified that breakdowns of this type could not be caused by a loose part falling into the gears, since such an occurrence would cause an immediate and complete stoppage in operation of the engine (Aps. 974, 978), which was not true as to either of the breakdowns of the "Urania" main

engine. Service engineer Cross testified to the same effect as to a part or foreign object falling into the gears (Aps. 1022-23) and further stated that there was no evidence found of such an occurrence in his inspection of the engine and gears of the "Urania" when opened up (Aps. 1067).

Effort was made by appellees to establish that a misalignment or bend in the shaft of the engine might explain the galling and failure of the timing gears. All witnesses interrogated on this subject agreed that design of these parts of the engine and absence of any evidence of misalignment completely eliminated misalignment as a possible cause of the breakdowns. This includes the testimony of Mr. Pike of American Bureau of Shipping (Aps. 1155, 1173), Mr. Dupuy, representing Lloyds (Aps. 1209, 1214), Mr. Summers representing the owners (Aps. 1248, 1254) and the following representatives of Union Diesel Engine Company: Mr. Cross (Aps. 987, 1001-02, 1012, 1068) and M. L. Newell (Aps. 1111-12).

Likewise, effort of appellees to establish misalignment of the gears or bearings in the engine as a possible cause of the breakdowns was overcome by the testimony of qualified expert witnesses interrogated on the subject to the effect that no misalignment was found on inspection of such parts. These witnesses included Mr. Pike (Aps. 1173); Mr. Dupuy (Aps. 1209, 1220-22); Mr. Summers (Aps. 1254-55, 1273, 1281); Mr. Cross who examined the gears and bearings at Manzanillo (Aps. 988, 1029, 1068), at sea before the second breakdown (Aps. 1008) and at Los Angeles (Aps. 1012); Mr. S. W. Newell, who stated it

was not physically possible for misalignment of the gears to cause the galling found to exist (Aps. 953-5); and Mr. M. L. Newell (Aps. 1091, 1096).

Extraordinary wear on the bearings or gears was advanced by appellees as a possible cause of the galling and breakdown. However, Mr. Pike testified that he found no wear out of the ordinary in the main or crank bearings (Aps. 1176). As to the spur gears, Mr. Dupuy testified that "They showed no excess wear" (Aps. 1225). M. L. Newell testified that upon opening the base plates to inspect the crankshaft immediately after arrival of the "Urania" at Los Angeles "there was no indication of wear of anything there, such as if a bearing had been burned out, but the oil appeared to be contaminated" (Aps. 1090).

In contrast to the clear and positive testimony of appellant's witnesses, the appellees produced several witnesses who testified as to opinions based on long and involved hypothetical questions. These witnesses included Frank H. Gallagher, surveyor for the American Bureau of Shipping, who had been in attendance at various times during the course of overhaul and repair work on the "Urania" at appellees' yard (Aps. 1682-83); J. D. Gilmour, marine surveyor, who made a survey aboard the "Urania" at appellees' request on October 15, 1948, the day before the vessel departed from appellees' yard on its ill-fated voyage (Aps. 1512); and Frank E. Blumberg, a mechanical engineer (Aps. 1554) who apparently was never aboard the "Urania." In addition, appellees called as a witness Herman Sanwick, a marine engineer in their employ at the time of the trial, but who was not working at the yard at

the time of the "Urania" repair and overhaul (Aps. 1606-07) and had apparently never been aboard the vessel.

These witnesses called by appellees attempted, in answer to hypothetical questions containing many assumptions, to express opinions which were inconsistent with and contradicted the positive findings of appellant's witnesses who examined the main engine and lube oil cooler at Los Angeles after the breakdown. Two of appellees' witnesses expressed the opinion that the galling of the gears could not have occurred in the manner described by appellant's fact witnesses (Gilmour, Aps. 1496; Blumberg, 1569). Yet both of these witnesses later conceded on cross-examination that their opinions were based on the assumption that there was no contamination of the oil passing through the lube oil cooler (Gilmour, Aps. 1518; Blumberg, Aps. 1591). We submit that, in view of the positive, uncontradicted testimony as to leaks found in the cooler when tested after engine breakdowns, the opinions of these witnesses based on such assumptions can be of little or no value. Again, appellees' witness Gallagher, an American Bureau surveyor, gave the following testimony (Aps. 1666):

> "Q. (continued): the contamination of the lube oil would be the cause of the galling of the gears; the timing gears?
>
> A. Very possible."

The trial court, in rendering decision, was apparently persuaded by the argument advanced by appellees that the "occurrence of the main engine's failure off Manzanillo was about eleven (sic) days after the ves-

sel left Seattle" (Aps. 72). Yet appellees' own witness, Mr. Gallagher, stated that "before, in my opinion, complete breakdown would result, why the cause thereof would have been progressive" (Aps. 1673). Mr. Sanwick, another witness for appellees, was interrogated on the same point and he stated: "Yes, it could be progressive contamination of the oil" (Aps. 1622).

From the above documentation of the pertinent testimony we submit that the court must find that appellant has established by a convincing preponderance of the evidence that the two breakdowns of the main engine were caused by salt water contamination of the oil used to lubricate the main engine of the "Urania," resulting in faulty lubrication, which in turn caused the galling and failure of the helical timing gears in the vertical shaft, particularly the lower timing gears.

It then becomes necessary to determine what caused the contamination of the lubricating oil. Appellant undertook to prove this contamination to be due to leaks in the seams separating the salt water coolant from the oil in the lubricating oil cooler, permitting salt water to penetrate into the lube oil side of the cooler and contaminate the oil. The following testimony clearly established this to be the source of contamination.

Mr. Pike of American Bureau of Shipping testified that he personally verified leaks existing in the oil cooler upon testing it ashore at Los Angeles (Aps. 1153) and identified the location of the leaks as at the seams in the cooler (Aps. 1154). These leaks were reported in his written survey (Respondent's Exhibit A-21, Aps. 1322-24).

Mr. Dupuy of Lloyds testified that leaks found in the oil cooler upon testing it at Los Angeles (Aps. 1210) and his report of survey (Respondent's Exhibit A-22, Aps. 1326-27) stated that "Lube oil cooler found leaking between salt water cooling and lube oil side, allowing salt water to contaminate the lube oil."

Mr. Summers, owner's surveyor, testified that "From my observation, I would say that the lubricating oil was contaminated because of leakage in the heat exchangers of the lubricating oil coolers. You wouldn't have to get very much salt water in the oil to make it so that it isn't a very effective lubricant" (Aps. 1269). He testified as to personal observation of the leaks in the oil cooler (Aps. 1271) and his report of survey confirmed his findings and opinion (Respondent's Exhibit A-23, Aps. 1345-47).

William Weiler, a radiator repairman employed by United Motors Service at Long Beach, testified that he himself tested the lube oil cooler when brought to the shop from the vessel for repairs (Aps. 1119-21). He described the leaks as appearing in the soldered seam where the core containing the tubes was soldered into the housing or casing (Aps. 1123, 1136). He illustrated the location of these leaks in the cooler on rough sketch (Libelants' Exhibit 15, Aps. 1143) as point Number 2 on Sketch A, (Aps. 1137).

M. L. Newell of Union Diesel Engine Company was present when Weiler tested the coolers (Aps. 1099) and observed "a lot of leaks around the edge of the honeycomb core, right in the line of the solder marks

where it was soldered into the casing" (Aps. 1100). He testified that on the lubricating oil cooler they found six leaks on one side and seven leaks on the other side (Aps. 1106). Mr. Cross (Aps. 1025) and Mr. S. W. Newell (Aps. 939-40) also testified as to the discovery of these leaks in the oil cooler.

Mr. Cross testified that upon first opening up the heat exchangers (coolers) upon arrival at Long Beach he found an abnormal amount of scale on the salt water side (Aps. 1012). Mr. S. W. Newell testified that it was not reasonable to assume that this scale would have formed in the oil cooler, and that it would become dirty and clogged, between the time of departure from appellees' yard after overhaul and the time of the first breakdown of the main engine ten days later (Aps. 942).

Looking now to the work claimed to have been performed on the lube oil cooler in appellees' yard and shops during repairs and overhaul under the contract, we find that appellees' pipe shop foreman, Mr. Oakland, testified that the oil cooler was brought to the shop by employees of the shipyard for cleaning and testing (Aps. 1437). Oakland stated that he cleaned out the coolers by using Jamlen's compound on the salt water side and another chemical on the oil side. He testified that these compounds were circulated through the coolers by use of a centrifuge pump. Thereafter he stated that he applied a 50-pound hydrostatic test to the cooler and that he found no leaks in the unit (Aps. 1438-39).

It is readily understandable why the leaks in the

lubricating oil cooler were not discovered by appellees' workmen when the 50-pound hydrostatic test was applied at the shipyard on Puget Sound. Mr. Demetri Antippas testified that he examined the oil cooler of the "Urania" as it was available in Seattle during the trial in the District Court and that a stamp on the casing of the unit prescribed 300 pounds pressure per square inch on the salt water side as the test pressure (Aps. 1382-83). This was the same oil cooler that was aboard the "Urania" at the time it was tested at the appellees' yard in 1948 and at the time of the two main-engine breakdowns. Later during the trial, when appellees sought to introduce another oil cooler unit in evidence for illustrative purposes (Aps. 1442), proctors for appellant advised the trial court and opposing counsel that the particular cooler unit from the "Urania" was available for introduction in evidence, but that it had not been offered as an exhibit because of its size, weight and bulk (Aps. 1443). After this statement was made the trial judge made the observation that an exhibit of this type was impractical because of the difficulty of incorporating it into the record in the event of appeal (Aps. 1443). The trial judge also stated that, "If you get all of the information submitted to the trial court in words, then you can get the same information exactly before any appellate court" (Aps. 1444). Consequently, appellant did not attempt to have the oil cooler admitted in evidence in its case-in-chief. Nor did proctors for the appellees make any demand for an opportunity to inspect the oil cooler as it was then available in Seattle during the trial.

Parenthetically, it may be stated that when appellant later sought during rebuttal to introduce the cooler for another purpose, namely, to rebut a statement by one of appellees' witnesses as to the design of a certain gasket (Aps. 1516), the appellees' objected strenuously to the admission of the oil cooler in evidence. The court sustained the objections as to its admissibility (Aps. 1714) and this Court later denied appellant's motion to permit additional testimony to be taken to support the identification of the unit so that it might be available as an exhibit before this court to assist in determination of the factual questions on this appeal.

As further conclusive evidence of the higher test pressures specified by the manufacturer of the lubricating oil cooler, attention is invited to the instructions contained in the operating manual for the main engine, which was offered and admitted in evidence as Respondent's (Claimant's) Exhibit A-16 (Aps. 874). This exhibit is before this Court on appeal in its original form by stipulation and order (Aps. 1729-33). On page 14 of this operating manual, issued by the main engine manufacturer, a chart is printed giving the following information relative to the lubricating oil cooler as installed aboard the "Urania."

"LUBRICATING OIL COOLER—PERFORMANCE DATA
Harrison H. E. — 1120-360 (one per engine)
LIQUID TO BE COOLED — S.A.E. 30 OIL
Operating pressure (Maximum)..... 75 psi
Test Pressure (with oil).....165 psi
COOLANT — SEA WATER
Operating Pressure (Maximum)..... 75 psi
Test Pressure (with water).....200 psi"

Mr. Weiler, the repairman who tested the lubricating oil cooler and other heat exchangers at Long Beach after the breakdowns testified that he used pressures of from 160 to 200 pounds (Aps. 1123). These are precisely the same pressures which are specified in the instructions printed in the main engine operation manual. (Respondent's Exhibit A-16.) Mr. Dupuy, Lloyds surveyor, recommended that the coolers be proved tight under a 100-pound hydrostatic test (Aps. 1216). Mr. Oakland, who conducted the test on the oil cooler for appellees, admitted that he did not obtain any instructions from Mr. Gallagher, the American Bureau surveyor, as to the pressure to be applied in testing the coolers (Aps. 1448). Mr. Oakland testified that he did not notice the stamp on the side of the cooler setting forth the manufacturer's specified test pressure of 300 pounds (Aps. 1453). Mr. Oakland admitted that he did not look for the manufacturer's plate specifying test pressures and that he might have found such a name plate if he had looked for it (Aps. 1458-59). S. W. Newell testified that the manufacturer of the cooler prescribed "a very extensive process to be followed in cleaning" coolers of this type (Aps. 979) and that cleaning of the cooler on shipboard is "impractical if not impossible" (Aps. 977).

Two of the appellees' witnesses sought to explain away the test pressure of 300 pounds per square inch, which Mr. Antippas had testified was stamped on a plate attached to the outside of the cooler units. These witnesses in effect claimed that the 300 pounds per square inch represented a maximum test pressure as

might be required under Navy construction specifications, and that such test pressure was not intended to indicate the amount of pressure to be applied in testing the units for leakage (Aps. 1515, 1560). Even if this court were to accept the explanation attempted by appellees' witnesses as to the test pressure stamped on the casing of the units, there would still remain in effect the test pressures which are indicated in the instructions contained in the operating manual (Respondent's Exhibit A-16), as shown above. Thus, the positive testimony of both witness Antippas and Respondent's Exhibit A-16 stands uncontradicted in this record to the effect that the manufacturer specified a test pressure from four to six times greater than the pressure claimed to have been applied by appellees' workmen during testing of and repairs to the lubricating oil cooler.

As to the ship repair yard's obligation in making tests upon this type of equipment, the statement of the Circuit Court of Appeals for the Second Circuit in *Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co.* (2 CCA) 281 Fed. 97 (cert. den., 259 U.S. 586; 66 L. Ed. 1076) is particularly applicable. The opinion of the court states, at page 106:

> "The customary method pursued in making such tests not having been followed in this case, it would seem that it should affirmatively appear that the one actually adopted was equally effective; but that does not appear, and no explanation is given for the failure to make the test in the customary manner."

The failure of appellees' employees in this case to fol-

low the manufacturer's recommendations as to amount of pressure to be applied in testing the oil cooler for leaks as prescribed in the operation manual available aboard the vessel and as shown to have been visibly displayed on a plate fastened to the cooler unit itself was a negligent act which readily explains the disastrous consequences that followed when the vessel put out to sea on her first voyage. It can hardly be argued that the test that was actually made, at a much lower pressure, was "equally effective" within the above rule, when contamination of the oil in the cooler resulted in crippling the main engine of the vessel.

Although appellees attempted to prove that incompetence, negligence or improper operation of the main engine, and particularly the oil cooler, by the chief engineer and his assistants might account for the engine breakdowns, such efforts utterly fail in the face of affirmative testimony by several qualified expert witnesses to the contrary.

Thus, service engineer Cross, representing the main engine manufacturer, testified that the chief engineer, as observed by him during the performance of his duties aboard the vessel, was "very competent" (Aps. 1024). Mr. Pike, the American Bureau surveyor, stated that he observed the chief engineer performing his duties and that "he performed his duties around the engine for me very satisfactorily" (Aps. 1160). Surveyor Summers stated that he observed the chief engineer and "my opinion was that he was a good chief engineer, because he had an interest in the job. He came up in the shop to check the shaft in the lathe

and observed all of the steps in the repairs. * * * I would say that he was a good and competent enginer, yes" (Aps. 1265). Baxevanis, the chief engineer testified to many years' experience with operation of marine diesel engines up to 2800 horsepower (Aps. 693-95).

Baxevanis testified that prescribed maintenance procedure was followed in the engine room at all times before the breakdowns (Aps. 743-44). He further testified to changing oil filters when the lubricating oil was changed (Aps. 745). He also stated that between departure from the shipyard on October 16 and the first engine breakdown at sea on October 26 the ship's engineers did not make any repairs on the main engine (Aps. 744).

Appellees sought to prove that use of a standby fire pump to increase the pressure of the salt water coolant through the oil cooler might have caused leaks resulting in contamination of the oil. This effort fails in the face of the testimony of service engineer Cross to the effect that when the standby pump was used just prior to the second breakdown, the pressures were "within a safe operating range," (Aps. 998) and that the use of the fire pump did not increase the pressures running through the system beyond safe operating pressures (Aps. 1003). S. W. Newell also testified that use of a standby pump to increase salt water pressure through the oil cooler was considered good normal marine practice (Aps. 909).

We submit that the conclusion is inescapable that the two breakdowns of the main engine were caused by the negligent failure of appellees to perform their

obligations under the contract for repairs and alterations to the "Urania" in that appellees failed to properly clean, test and repair the lubricating oil cooler. This resulted in the vessel putting out to sea with a defective, dirty and leaky oil cooler and caused contamination of the oil with salt water during the course of the first voyage which in turn caused the main engine to break down on two occasions when the timing gears failed due to faulty lubrication.

Significantly, Mr. Cross sent a telegram from Manzanillo on November 1, after his first inspection of the vessel, which stated in effect that appearance of general workmanship done on the vessel at Seattle made it advisable for the vessel to return to some west coast U.S.A. port where all parts of engine could be closely inspected (Aps. 1042). He found the oil tubing badly kinked and other parts of the engine didn't work properly (Aps. 1043).

Again, it is significant to note that the specifications between appellant and appellees for main-engine repairs, Libelant's Exhibit No. 4, specified under item 1 that appellee was to "Furnish services of factory representative to supervise operation of diesel engine" (Aps. 256). Mr. S. W. Newell, representing the manufacturer of the engine, testified that on September 9, 1948, he instructed his factory representative at Tacoma, Washington, to make himself available for this work, but that appellees never requested the factory representative to assist with the repairs to the main engine and he did not perform any such service (Aps. 891-92).

Although Mr. Oakland claimed that he, on behalf of

appellees, had opened, cleaned and tested the coolers, Mr. Weiler, the repairman at Long Beach, testified that he found no evidence that the coolers had been repaired recently (Aps. 1126). In fact, Mr. M. L. Newell testified that when the coolers were opened up at Long Beach, the paint on the bolts necessary to disassemble the coolers was hardened so that in his opinion it must have been "a year—probably more" since they had been removed (Aps. 1117). There was no evidence that the coolers had been disassembled or covers unfastened or any work done on the coolers recently (Aps. 1114, 1117). There was no evidence that the cooler had been patched up or soldered (Aps. 1115). The zinc plates which are placed in such coolers to retard electrolysis were found to have only about 30% of the metal left when examined at Long Beach (Aps. 1100) indicating that they had not been recently replaced (Aps. 1117) as claimed by appellees' employee, Mr. Oakland (Aps. 1441).

In connection with the above, it is important to note the observation of the trial judge as to the candor of the appellees' witnesses in testifying as to the repair work performed on the "Urania." It is found in the court's Decision, appearing herein at page 70 of the Apostles, where it is stated:

> "Some of the shipyard foremen or subforemen failed to relate from the witness stand very clear-cut narratives or accounts of what was done, or definite personal knowledge of details of the work actually done. In at least three instances, I thought libelant's (appellees') witnesses showed a surprising lack of personal recollection of the details of the work done." (Aps. 70)

This observation is of more importance on this appeal, since the trial court had the opportunity of personally observing appellees' witnesses while appellant's testimony in the main was given by deposition. On this appeal, the court will not have the disadvantage of contrasting deposition testimony with that given by witnesses appearing in person, since all testimony is now contained in the written record.

II. (a) Clayton Boiler Failure

Under Assignment of Error 6, appellant contends its evidence offered in the District Court clearly proved, as alleged in the cross-libel, that faulty repairs to the pumps on the Clayton boiler by appellees caused the unit to break down and fail to operate properly.

The appellees' workmen undertook to repair the pumps on the Clayton heating boiler as extra work (Item No. 14, Libelants' Exhibit No. 4, Aps. 262). This involved removal of the unit from the vessel to appellees' shop ashore, dismantling and disassembling the pumps and renewing some parts (Aps. 1475). All of this work was done by appellees' workmen under the direction of the machinist foreman for Commercial Ship Repair (Aps. 1475). The machinist foreman conceded, however, that he did *not* see the pump in operation aboard the ship after it had been reassembled in the shop (Aps. 1476).

Even before departure of the "Urania" from appellees' shipyard, difficulty was experienced in the operation of the pump on the Clayton boiler, which necessitated appellant's Seattle agents engaging an independent surveyor to determine the cause of the

difficulty and arrange with appellees to make corrective repairs (Aps. 754). The report of this surveyor (Respondents Exhibit A-6, Aps. 756-7), disclosed that the feed pump was leaking and not operating satisfactorily. The pump was not then disassembled, but the feed pump was repacked and emulsified oil was removed from the crankcase of the pump at that time (Aps. 758-9). Notwithstanding these attempted repairs, the Clayton boiler pump failed to function satisfactorily after departure of the "Urania" from appellees' shipyard, and when it was partially dismantled at sea by the chief engineer, broken parts and pieces were found in the unit (Aps. 744).

Upon arrival of the "Urania" at Los Angeles after main engine breakdowns a service representative of the manufacturer of the Clayton boiler went aboard the vessel and removed the complete pump unit to the manufacturer's shop for repair (Aps. 825). Upon further dismantling in the shop it was found that the positions of the pump heads had been changed in reassembling the parts incorrectly after recent repair, causing misalignment and crankshaft damage in the pump (Aps. 825, 827). After repair and replacement of broken parts by the manufacturer, the pump unit was reinstalled on the Clayton boiler aboard the "Urania" and it operated satisfactorily (Aps. 830). Record of the findings of the manufacturer's representative on the dismantling of the pumps, and the repairs made, is contained in Respondent's Exhibit A-15 (Aps. 1393-4).

(b) Failure of Telemotor Steering System

Appellant contends under Assignment of Error Number 7 that evidence offered in the District Court clearly proves that failure of the telemotor steering system was caused by faulty repairs made by appellees before departure of the vessel from the shipyard on October 16, 1948.

Appellees undertook to overhaul and test the steering system under the specifications in the original contract (Item 26 of Libelants Exhibit No. 1, Aps. 186). Appellees' machinist shop foreman, Harold Woodman, testified that while the "Urania" was in the yard he checked the steering engine and the telemotor, which latter unit is described as a hydraulic system connecting the controls in the pilothouse with the electric steering motor in the aft part of the ship (Aps. 1468-69). He stated that they found the steering system to be working properly. Woodman stated that the only repairs accomplished by machinists on the steering system were to put a little oil in the telemotor, get power on the motor, oil up the machinery and remove the blocks on the rudder quadrant (Aps. 1471-72).

Appellees' electrical foreman, Harold Wells, testified that while the "Urania" was in the yard he checked the wiring and connected up the microswitches on the steering system (Aps. 1547). He admitted that the connection of the switches and wiring was in part by the "trial and error method" and that he did not obtain a wiring diagram to check the proper hookup (Aps. 1548-49). He stated that the system

was operated for one or two hours at the dock and it "appeared to be" in proper operating order (Aps. 1547).

Neither machinist foreman Woodman nor electrical foreman Wells was present to observe the operation of the steering system on a sea trial (Aps. 1468, 1549).

Another electrician, Lester Short, was sent from appellees' yard to Port Angeles to repair the electrical portion of the steering system after it failed on the date of departure from appellees' yard (Aps. 1529-30). He found the system to be oscillating or "hunting". After checking he stated that he found the cause of this failure was an improper adjustment of the hydraulic cam on the telemotor control unit (Aps. 1530).

Mr. Clarke, the surveyor engaged by appellant's Seattle agents, also went aboard the "Urania" at Port Angeles to ascertain the cause of the steering system breakdown and assist in arranging repairs (Aps. 760-61). He testified by deposition that the cause of the failure was a broken wire, "a floating break," in the electrical steering engine, which would make and break, causing the controlling motor to hunt (Aps. 766), as confirmed in his report of survey. (Respondent's Exhibit A-7, Aps. 763-64).

Again, we submit that the failure of the telemotor steering system within a few hours of departure from appellees' yard, together with the testimony of appellees' workmen showing inexperience, lack of knowledge, and "trial and error" method of repairs, clearly

indicates negligent failure of appellees to perform their obligations to repair. This is particularly true in view of the above-mentioned findings as to the cause of the telemotor steering system failure; namely, a broken wire or improper adjustment of the controller motor.

This court has, in *The Ecuador* (9 CCA) 1926 A.M.C. 342, 345, 346, 10 F.2d 769; and in *Lake Union Dry Dock & M. Works v. U.S.A.* (9 CCA) 79 F.2d 802, 1936 A.M.C. 250, 252; approved and followed the rules announced by the Court of Appeals for the Second Circuit in *Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co.* (2 CCA) 281 Fed. 97 (cert. den. 259 U.S. 586, 66 L.Ed. 1076), as to the nature and extent of a ship repair yard's duties and obligations to a vessel and her owners, and also as to the burden of proof in such a case as the present one. In the *Pan-American* case, *supra*, the repairer contracted to overhaul the electric telegraph system of a ship. When the ship was returned to the owner for service the wires of the system were crossed so that signals correctly given on the bridge did not register properly in the engine room. In consequence of this hookup of the telegraph there was a collision with another vessel. A libel was brought against the ship repairer for resulting damages, the shipowner claiming that the shipyard had negligently failed to perform its contract obligations. In holding the ship repair yard liable for damages the court said, at page 108:

> "It needs no citation of authorities to establish the elementary principle that, where skill is required in performing the bailee's undertaking,

as in the case of the work to be done on the electrical apparatus of this steamship, the bailee must be understood to have engaged to use a degree of skill adequate to the performance of his undertaking. (citing cases)

"And it is equally elementary that ordinary care is that degree of care which reasonably may be expected of one in the given circumstances. (citing cases) * * *. And from what we have said in a former part of this opinion it sufficiently appears, and for the reasons given, that we do not think the respondent exercised the degree of care which the circumstances of the case required of it."

After pointing out that the liability of the respondent was not based on negligence or tort, but upon failure to properly perform the contract to repair the vessel, the court said, at page 109:

"But the libelant is in court alleging the nonperformance of the contract, and the defendant (*sic*-respondent) is in court alleging that it performed the contract fully. The law is elementary that, where a defendant pleads performance, he assumes the burden of proof. If an affirmative contract to perform some duty is proved, it is then incumbent on the defendant to prove performance or a sufficient excuse for the failure to perform. (citing cases) * * *.

"The burden was on the libelant to prove the contract, and that at the time the respondent delivered back the ship the telegraph was not properly adjusted and in good working condition. This burden was sustained. The presumption then arose that the respondent had not performed its contract, and was responsible for the condition in

> which the telegraph then was. The burden then rested on the defendant (*sic* respondent) to overcome this presumption, and to establish by a preponderance of the evidence that it had fully performed its agreement, and that the crossing of the wire and chain connection of the ship's telegraph was not due to its workmen's lack of skill, or careless conduct of the work, while the ship was in the respondent's possession."

In the present case appellant has proved, and appelles certainly will not dispute, a contract undertaking by appellees to clean, test and repair the lubricating oil cooler, to overhaul, replace parts and repair the Clayton heating boiler and to test and repair the telemotor steering system of the "Urania." These undertakings were testified to by appellees' own employees and witnesses, and charges for this work make up the claims for which appellees brought the libel against the vessel. In the *Pan-American* case, *supra*, the shipowner sustained the burden of proving that the telegraph was not properly adjusted by proof of its faulty operation and testimony of witnesses as to their finding wires improperly hooked up. Likewise, we submit that in the present case, appellant has proved that the oil cooler, the Clayton boiler, and the telemotor steering system were not properly tested, repaired and adjusted by appellees by testimony of various witnesses that the several units were found to be not functioning properly either at the time of redelivery of the vessel on completion of repairs or within a short period of time thereafter. Beyond this, we submit that appellant has succeeded in proving that no other cause other than nonperformance or malperformance of appellees'

obligations could possibly have caused or contributed to the failure of the several units of machinery aboard the "Urania."

The failure in performance of appellees' obligations to repair the vessel render appellees liable upon the cross-libel for resultant damages. Thus, in the *Pan-American* case, *supra*, the court said, at page 106:

> "To deliver over the ship with the wires double-crossed was not good workmanship and was not a compliance with the contract under which the respondent agreed with the libelant to perform certain work upon the ship, including that of overhauling and adjusting the engine room telegraph 'according to good steamship practice and with workmanship of the best quality'."

Damages

Of the fifteen items of damage set forth in the cross-libel (Aps. 20-21), appellant waived its claim to some items during trial, values were stipulated by proctors as to some items, and on other items appellant offered uncontradicted proof as to values and payment. To simplify consideration of these items on this appeal the following tabulation has been made showing the disposition of each item.

Cross-Libel Item No.	*Nature of Claim*	*Cross-Libel Amount*	*Exhibit Reference*	*Disposition on Appeal, Supporting Testimony, or Stipulation of Proctors*	*Amount Claimed on Appeal*
1.	Repairs to Clayton boiler and generator at Long Beach	$ 678.86	Resp. A-15 Aps. 1393	Aps. 1389-90, admitted as to labor items only — disallowing parts	$ 336.76
2.	Removal of ammunition bulkhead not effected	275.00	Item 36 in Lbts. Ex. 1, Aps. 189	Aps. 329 — disallowance by trial court not assigned as error on appeal	nil
3.	Expenses incurred during delay at Winslow, Wash.	3936.00	Resp. A-1 Aps. 228	Disallowance by trial court not assigned as error on appeal	nil
4.	Loss of profits during delay at Winslow, Wash.	4000.00	Resp. A-1 Aps. 228	Disallowance by trial court not assigned as error on appeal	nil
5.	Telemotor repairs at Pt. Angeles, Wash.	262.51	Resp. A-5 Aps. 628	Aps. 753 and see discussion in brief	262.51
6.	Deviation to Pt. Angeles, for telemotor repairs	310.00	Resp. A-5 Aps. 628	Aps. 656-57 proves 12 hrs. delay. Stipulation of proctors, Aps. 1348, fixes $250 per diem	125.00
7.	Towage after breakdown from Manzanillo, Mex. to Los Angeles, Calif.	4286.00	Resp. A-25 Aps. 1304	By stipulation of proctors, Aps. 1302-06 amount agreed	4118.00
8.	Engine repairs at Long Beach, Calif.	4475.00	Resp. A-17 Aps. 1308-20	By stipulation proctors, Aps. 1306 amount agreed	4275.00
9.	Miscellaneous corrective repairs	3214.00		No testimony offered — waived	nil
10.	Corrective cleaning of tanks	2157.00		No testimony offered — waived	nil
11.	Additional fuel consumed on account deviation for repairs	974.00	Resp. A-27 Aps. 1400	Aps. 1422-24 and discussion in brief	692.25
12.	Disbursements at Manzanillo	969.00	Resp. A-9 Aps. 1354	Supporting exhibits not admitted	nil
13.	Disbursements at Los Angeles	1911.00	Resp. A-24 Original on file	By stipulation of proctors, Aps. 1301 amount agreed	1409.89
14.	Expenses vessel during repairs	7252.00	Resp. A-24 Original on file	By stipulation of proctors, Aps. 1348 amount agreed at $250 per diem	7000.00
15.	Loss of profits during corrective repairs	7000.00	Resp. A-25 and A-26, Aps. 1401 and 1361	Aps. 1403-08, Aps. 1357-65	7000.00
				Total	$25,219.41

Thus, as to items numbered 2, 3, 4, 9, 10 and 12, no contention is made on this appeal that any damages should be allowed by a decree on the cross-libel.

The proof of Item 1, Clayton heating boiler repairs, was restricted by the trial judge, on admission in evidence of Respondent's Exhibit A-15, to the cost of labor, exclusive of cost of parts (Aps. 1391). As to the amount of $336.76 claimed on this appeal, the evidence is uncontradicted that the work was performed, the charges were reasonable, and the amount was paid by appellant (Aps. 831, 1390).

As to Item 5, cost of telemotor repairs, the charges included in the total of $262.51 are made up principally of appellees' own invoice for furnishing workmen to perform the corrective repairs (Aps. 629), together with the surveyor's fee. Obviously, no effort was made by appellees to contradict these charges.

As to Item 6, appellant now claims the amount of $125.00 as damages for loss in deviation to Port Angeles for telemotor repairs. This is calculated on the basis of log entries (Respondent's Exhibit A-8, in original form per order, Aps. 1732) and testimony of Capt. Beis, the master (Aps. 656-57) which show a loss of 12 hours' time during the deviation to Port Angeles for repairs. Appellees have stipulated that the reasonable operating expense of the "Urania" was $250.00 per diem (Aps. 1348). Allowing for one-half day, or 12 hours, the damages are proved to be $125.00.

Item 7, covering cost of towing the "Urania" to Los Angeles after the second breakdown at sea, in the sum of $4275.00, was agreed upon by stipulation

of proctors to be reasonable in amount and its payment by appellant was also stipulated (Aps. 1302). Its relation to the breakdown of the "Urania" is patent from the testimony of various witnesses as to the failure of the main engine and the necessity for towage assistance.

Ample testimony was given by officers and employees of Union Diesel Engine Company as to the necessity for and the reasonableness of charges for main engine repairs under Item 8. In fact, proctors for appellees stipulated as to the reasonableness of these charges in the adjusted amount of $4275.00 and their payment by appellant (Aps. 1306).

The cost of additional fuel consumed by the vessel and claimed under Item 11 was calculated and testified to by Mr. Antippas (Aps. 1422). Due allowance was made for varying rates of consumption dependent upon whether the vessel was under way at cruising speed or was merely operating auxiliaries or on standby while in port or in tow of the salvage tug (Aps. 1423-24). The cost of this oil was proved on the basis of market price at San Pedro at the time of replenishment of bunkers in November, 1948 (Aps. 1425), and receipted invoice for fuel actually furnished to the "Urania" on November 17, 1948 (Respondent's Exhibit A-27, Aps. 1400).

Proctors for appellees stipulated as to the reasonableness of charges and payment in the sum of $1409.89 for miscellaneous disbursements made at Los Angeles during period of corrective repairs, which are claimed as a recoverable item of dam-

ages under Item 13 (Aps. 1301). An examination of these items as they appear in Respondent's Exhibit A-24 (not printed in Apostles, but original a part of record on appeal per order, Aps. 1732), will clearly indicate their relation to the various other elements of delay and corrective repairs necessarily made at Los Angeles.

As to Item 14, appellant now claims the amount of $7000.00 as damages for loss due to operating expenses of the "Urania" during periods of breakdown off Manzanillo through repair at Los Angeles and until the "Urania" resumed her intended course and voyage. A total loss of time of 28 days is claimed. This lost time is calculated as follows:

First breakdown of vessel off Manzanillo, Mexico	October 26
Vessel arrived Los Angeles in tow salvage tug	November 11
Repairs completed and vessel departed Los Angeles for Manzanillo to resume voyage	November 17
Vessel arrived and departed Manzanillo, resuming voyage from approximate point of first breakdown	November 23
Total elapsed time	28 days (plus)

(per Aps. 660-61, 729, 1019-20, and Respondent's Exhibit A-8, log book entries in original form per order, Aps. 1732-33). Here again, appellees' stipulation as to reasonable operating expense of $250.00 per diem results in proved damages for 28 days' delay of $7000.00.

Appellant claims its loss of profits during periods of breakdown and repair under Item 15. In proof of such damages, appellant offered testimony of Mr. Wallace, agent for the "Urania" at Seattle, as to attempts made to secure employment for the vessel in September or October, 1948 (Aps. 1357). The witness testified as to prospects of a charter in the molasses trade between the Philippine Islands and Japan (Aps. 1359). Although the charter never materialized, it is appellant's contention that the negotiations thereon were indicative of the prospective value of this particular vessel in the charter market and that such testimony and Respondent's Exhibit A-26 (Aps. 1361) should have been admitted and considered as competent evidence to prove the claim under Item 15 for loss of profits.

Of still more importance in connection with appellant's proof of Item 15, relating to loss of profits during breakdown and repairs, was the ruling of the trial court sustaining objections to the offer in evidence of Respondent's Exhibit A-25 (Aps. 1401). Appellees objected to testimony of Mr. Antippas as to this time charter party on the vessel in December, 1948, which appellant offered, to show what profit was actually realized on the vessel. This ruling of the trial court in excluding the time charter offered as Respondent's Exhibit A-25 is one of the assigned errors relied upon by appellant, being Assignment of Error Number 12 (printed in full in appendix). Respondent's Exhibit A-25 is also reproduced as an appendix to this brief, as required by Rule 20 of the Rules of Practice of this Court.

Loss of profits due to detention of a vessel while repairs are being made has been recognized as a proper item of damages by this court, which has also recognized the practical impossibilities of proving the damages with certainty. Thus, in *Aktieselskapet Bonheur v. San Francisco & P.S.S. Co.* (9 CCA) 1923 A.M.C. 375, 377, 287 Fed. 679, the court said, at page 682:

> "Where the damages alleged to have been sustained in the interim of detention arise by reason of loss of earnings, the inquiry is not whether they could possibly have been made by the use of the vessel, but whether they would have been made; and, as anticipated earnings of the vessel cannot always be certainly ascertained and definitely proven, it suffices if they are proven circumstantially and with a reasonable degree of certainty."

See also annotations on "Liability of one contracting to make repairs for damages for improper performance of the work" in 1 A.L.R. 1654 and 44 A.L.R. 824, the latter annotation citing *Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co., supra,* in support of the general rule.

The Circuit Court of Appeals for the Second Circuit has recognized and allowed the shipowner loss of profits against a ship repair yard for periods of delay and detention computed on the basis of what the vessel would have earned under a charter. In *The Penelopi* (2 CCA) 1945 A.M.C. 541, 545, 148 F.2d 884, the court stated:

> "The wrongful detention therefore caused her to begin earning hire 31 days later than she other-

wise would. The fact that actually she was off hire for sixteen days instead of eight because the owner did the work unnecessarily slowly is, as the district judge said, immaterial, since during those days the ceiling prices for charter hire remained unchanged. Demurrage should be computed for thirty-one days."

The U. S. Supreme Court, after recognizing loss of profits as a proper element of damage for a maritime tort, has stated the rule as to proof of such damage in *The Conqueror*, 166 U.S. 110, 127, 41 L. Ed. 937, 945 as follows:

> "In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention."

Since the "Urania" would have been available on the east coast for charter purposes during November, 1948, but for the breakdowns and consequent delay, we submit that the best evidence to establish the loss of profits sustained by appellant due to breakdowns causing delay in arrival would be the value of the vessel in the charter market in that month and the months immediately succeeding and following, and the profits actually obtained from such a charter in December, 1948. An examination of the testimony and exhibit offered, to which objections were sustained, clearly indicates that the amount of $250.00 per day claimed by appellant as loss of profits was

less than the per diem profit actually earned by the vessel in December, 1948 (Aps. 1407). That the proof of profits made in December, 1948, was competent to establish loss of profits in October or November, 1948, is established by the above authorities. This is particularly true since the witness Antippas testified as to a decline in the charter market in December from values in October and November (Aps. 1407). We submit that this testimony and Respondent's Exhibit A-25 should have been admitted in evidence, and that with such evidence before the Court, appellant has made ample proof to sustain a decree awarding $7000.00 under Item 15 representing allowance of loss of profits for 28 days during deviation, delay and corrective repair periods (Aps. 47, 1424-25).

CONCLUSION

The contentions of appellant may be summarized as follows:

1. *Main Engine Breakdowns* (Assignments of Error 8, 9, 10 and 13):

Appellant has sustained the burden of proving by a preponderance of the evidence that appellees failed to properly perform their obligations by contract to overhaul, test and repair the main engine of the "Urania," and more particularly the lubricating oil cooler forming a part thereof, and have proved by competent testimony of experts that the two breakdowns of the main engine of the "Urania" were caused by the faulty or negligent performance, or nonperformance, of appellees' obligations. Appellees' testimony falls far

short of controverting the above or establishing that the overhaul, testing and repair of the lubricating oil cooler was performed in a proper, workmanlike manner, according to good shipyard practice or manufacturer's specifications. Therefore, appellant is entitled to a decree against appellees on the cross-libel for the damages proved to have resulted from such failure in performance of obligations.

2. (a) *Clayton Boiler Failure* (Assignment of Error Number 6):

Appellant has sustained the burden of proving by a preponderance of the evidence that appellees did not properly perform their obligations by contract to overhaul, replace parts, reassemble and place in good operating condition the Clayton heating boiler aboard the "Urania," and more particularly the pump unit thereon. Appellant has proved by competent testimony that this unit of machinery did not function properly after overhaul and reassembly by appellees and in fact was found to have been reassembled improperly, causing the failure. Therefore, appellant is entitled to a decree against appellees on the cross-libel for the damages proved to have been sustained by reason of such failure in the performance of appellees' obligations.

(b) *Failure of Telemotor Steering System* (Assignment of Error Number 7):

Appellant has sustained the burden of proving by a preponderance of the evidence that failure of the telemotor steering system was caused by faulty repairs and hookup of controls on this unit of machin-

ery in the course of appellees' undertakings by contract to overhaul and test the system. Appellant is entitled to a decree against appellees on the cross-libel for the amount of damages proved to have resulted from such failure in the performance of appellees' obligations.

3. *Damages* (Assignment of Error 12 and other assignments mentioned above):

The trial court erred in sustaining appellees' objections to the offer in evidence by appellant of Respondent's Exhibit A-25, a time charter party on the vessel for a period in December, 1948. This charter party was properly identified and was competent evidence, if not the best evidence available, to establish the earnings of the vessel to calculate demurrage or loss of profits.

Other elements of damage claimed by appellant on this appeal have been either proved by competent evidence, or appellees have stipulated as to the reasonable value of the items and to their payment. All items now claimed by appellant are recognized as items properly allowable under the circumstances.

According to statement of these items presented earlier in this brief, the total amount now claimed by appellant on the cross-libel, under the Assignments of Error relied upon on this appeal, is the sum of $25,219.41.

We ask that this Court weigh the evidence and consider the argument made on behalf of appellant and then order that a decree be entered in favor of

appellant and against appellees on the cross-libel for such damages as the Court finds are due and have been proved.

Respectfully submitted,

MERRITT, SUMMERS & BUCEY,
LANE SUMMERS,
CHARLES B. HOWARD,
Proctors for Appellant.

APPENDIX

I.

ASSIGNMENTS OF ERROR RELIED UPON BY APPELLANT

The trial court erred as follows:

(6) In finding that work performed by libelants on the Clayton boiler aboard respondent vessel was performed in a competent, workmanlike manner and in accordance with good shipyard practice; and in failing to find to the contrary, and that the failure in operation and the damage sustained to the said Clayton boiler was caused by malperformance or nonperformance of libelants' obligations under the additional work specifications.

(7) In finding that work performed by the libelants on the telemotor steering system aboard the respondent vessel was performed in a competent, workmanlike manner and in accordance with good shipyard practice; and in failing to find that the breakdown of said telemotor system near Port Angeles, Washington, was due to failure of the libelants to properly perform their obligations under the original contract specifications to open up, test and adjust the telemotor, and report any deficiencies found therein to claimant's representative.

(8) In finding that all work done on the main engine of respondent vessel, save that work done by riggers, was done at the direction of and under the supervision and control of the respondent vessel's chief engineer, and that libelants (cross-respondents) undertook no duty on their own responsibility to deter-

mine the extent of repairs, servicing or testing necessary, but did only what the chief engineer directed pursuant to contract stipulation; and in finding that all of the work performed by libelants' employees on the main engine of the respondent vessel was done in a competent and workmanlike manner, and that it was accepted and approved by claimant corporation (cross-libelant).

(9) In finding that claimant corporation (cross-libelant) failed to sustain the burden of proof as to the cause of the main engine breakdowns off the west coast of Mexico on October 26 and November 5, 1948; and in the failure of the court to find that said breakdowns were caused by defective workmanship and material furnished to respondent vessel by libelants under the original contract and additional work specifications.

(10) In the failure of the trial court to find that the breakdowns of the main engine on October 26 and November 5, 1948, were proximately caused by the malperformance or nonperformance of libelants' obligations under the additional work specifications on respondent vessel by reason of the improper testing and negligence in repairing or failure to repair leaks existing in the lubricating oil cooler installed on said main engine, resulting in salt water contamination of the lubricating oil which, in turn, caused galling of the vertical gears on the main engine and resulted in such breakdowns of the main propulsion engine on the respondent vessel while at sea.

(12) In ruling that photostatic copy of charter

party on respondent vessel (cross-libelant's identification A-28) identified by witness Demetri Antippas, and his testimony as to profits under such charter party, which identification and testimony were offered by cross-libelant as proof of earnings of the vessel on charter voyage after the voyage upon which the breakdown occurred, were not admissible in support of cross-libelant's claim for loss of profits during periods of loss of use of the respondent vessel due to breakdowns alleged to have been caused by defective workmanship and materials furnished by libelants. Offer of identification A-28 and testimony in support thereof were objected to by one of cross-respondents' proctors as follows:

> "MR. WHITE: May we object upon the ground, first, that there is no foundation laid that a boat could possibly have been chartered here which would support such testimony as this; and secondly, that this was a different time, under different conditions, with different parties, carrying a different product.
>
> "I submit to the Court that under those circumstances this could have practically no weight as far as showing any loss of profits is concerned."
>
> * * * * * * * * * *
>
> "MR. WHITE: I object to that, Your Honor, on the ground that what the charter market might have been on the East Coast in December would have no bearing upon the issues in this case, since if there is any loss of profits it is during the month of October, around there.
>
> THE COURT: That objection is sustained.
>
> * * * * * * * * * *

"MR. WHITE: I object to that, Your Honor, on the grounds as stated before; different conditions, different product, different time, different parties involved.

"THE COURT: The objection is sustained as to this particular proposed charter.

"MR. HOWARD: I would like to make a very brief statement. This vessel broke down on the West Coast of the United States or Mexico. Obviously, it would not be possible to charter a vessel during the period it is broken down.

"We submit that we should be entitled to prove by this witness what the vessel earned when it did get back to the East Coast after repairs had been made, because we obviously could not testify as to the earning power of the vessel during the period it was broken down.

"THE COURT: You could prove by some witness who knows what the charter market was for a vessel of this type during the period of the breakdown.

"The objection is sustained and the Court will disregard the statement of the witness regarding the profits of this charter.

"MR. HOWARD: At this time, for the purpose of the record, I offer Identification A-28.

"MR. WHITE: That is objected to on the grounds previously announced.

"THE COURT: Sustained. Admission is denied."

(13) In finding that cross-libelant was not entitled to recover any damages claimed in the cross-libel as amended at the time of trial; and in denying to cross-libelant its damages in the sum of $36,329.37 against cross-respondents as shown by the evidence,

for the cost of corrective repairs, towing services, additional vessel operating expenses, loss of profits, additional fuel consumed, and agency expenses incurred as a result of the several breakdowns of the vessel due to defective workmanship and materials furnished by libelants.

APPENDIX

II.

CORRECTIONS IN APOSTLES

We note the following corrections in the Apostles on Appeal:

Page viii of index, Gallagher re-cross, "1090" should read "1691."

Page 239, line 27, "olny" should read "only."

Page 325, line 30, "Would be" should read "Would you."

Page 389, line 3, "Mr. Kokanson" should read "Mr. Hokanson."

Page 421, line 20, "Mr. Tokanson" should read "Mr. Hokanson."

Page 886, line 8, "course" should read "coarse."

Page 923, line 11, "stated" should read "state."

Page 973, line 29, "ingine" should read "engine."

Page 1108, line 16, "curret" should read "current."

Page 1127, line 15, "he" should read "the."

Page 1131, line 4, "wihch" should read "which."

Page 1251, line 8, "thae" should read "that."

Page 1297, line 11, "seat" should read "sea."

Page 1303, line 22, the first "Exhibit 25" should read "Exhibit 24."

Page 1511, line 28, "ourt" should read "court."

Page 1574, line 21, "ashed out" should read "washed out."

Page 1585, line 19, "not" should read "no."

Page 1669, line 12, "khat" should read "what."

No. 12322

In The United States Court of Appeals
For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment,

Appellant,

vs.

E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

FILED
FEB 21 1950
PAUL P. O'BRIEN,

BRIEF OF APPELLEES

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THE ARGUS PRESS, SEATTLE

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In The United States Court of Appeals
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COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment, *Appellant*, vs. E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair, *Appellee*.	No. 12322

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

ARGUMENT

In our argument we shall first discuss the main engine breakdowns and then consider separately the issues raised by appellant's claims relating to the Clayton boiler and the telemotor system.

Appellees' position on the main engine breakdowns may be summarized in the following three propositions, which will be considered in order:

1. Since appellees' contractual undertaking respecting the main engine was limited to lending personnel to work under appellant's supervision and control, responsibility for the acts of appellees' employees

pursuant to such undertaking was solely that of appellant.

2. Assuming *arguendo* appellees had a contractual duty and responsibility for the acts of their employees in performing work on the main engine, no breach of duty, either contractual or tortious, was established.

3. Assuming *arguendo* (a) that appellees had a contractual duty or obligation, and (b) that such duty was breached, appellant wholly failed to establish or sustain proof that its damages were proximately caused by such breach.

Thus, in order to prevail on this appeal, appellant must prove (1) a duty, (2) a violation thereof, and (3) damages directly and proximately resulting from such violation of duty. Appellant's brief addresses itself exclusively to propositions two and three. From appellant's viewpoint this avoidance of proposition one is understandable, since its case cannot survive a discussion thereof.

1. Since appellees' contractual undertaking respecting the main engine was limited to lending personnel to work under appellant's supervision and control, responsibility for the acts of appellees' employees pursuant to such undertaking was solely that of appellant.

As appellant observed on page 11 of its brief, this appeal involves primarily questions of fact. Appellant's "Statement of Case" entirely overlooks one essential fact, a fact so crucial that the trial judge held it in itself to be decisive of the liability for the main engine breakdowns.

That fact is that the work of cleaning and testing the lubricating oil cooler on the main engine (Appellant's Br. 4) was contracted to be performed (Aps. 326-7) and was actually performed (Aps. 1437, 1439, 1447) in all respects subject to and under the supervision and in accordance with the directions of the vessel's chief engineer. The trial court's decision on this matter as expressed in its opinion delivered at the close of the case is as follows:

> "* * * libelants (appellees) as repairmen undertook on their own responsibility no duty to determine the extent of repairs or servicing or testing which was to be done, but did only what the chief engineer specifically directed in pursuance of the contract stipulation in that connection." (Aps. 1724)

Appellant in its "Statement of Case" (Appellant's Br. 5) glosses over this crucial phase of the case as follows, "All of the work on the lubricating oil cooler was done by appellees' workmen without participation by members of the crew (Aps. 716, 738-9)." Careful reading of the references cited to the record reveals that they contain merely the bare assertion by appellant's chief engineer that the "work" on the cooler was done by appellees' workmen. However, there is nowhere in the record a denial by any witness of the fact that all "work" was requested, specifically prescribed, supervised and approved by appellant's authorized agents.

Consideration of the voluminous testimony relating to possible causes of the "Urania's" main engine breakdowns is unnecessary unless the following finding of the District Court is overturned:

> "That with respect to work on main engine of said vessel libelants (appellees) undertook on their own responsibility no duty to determine the extent of repairs, servicing, or testing necessary, but did only what the chief engineer of said vessel directed in pursuance of contract stipulation in that connection." (Aps. 87-88)

The original contract between appellant and appellees referred to on page 3 of appellant's brief made no provision whatsoever for work on the main engine of the "Urania" (Aps. 178-195). All labor and material to be furnished by appellees for the main engine was ordered by appellant's representative, Harry F. Williams, subsequent to the execution of the original contract. This additional work ordered by Mr. Williams for the main engine was, pursuant to contractual engagement, all to be done subject to the direction and supervision of the vessel's chief engineer, appellees to furnish only such assistance as appellant requested through its authorized agents (Aps. 326, 327, 349, 597, 598). The ship's crew was to effect the repairs to the main engine, and to rely on yard personnel only to perform such tasks as Mr. Williams and the chief engineer of the vessel might direct and supervise (Aps. 349, 1462). One of the most keenly contested issues in the trial of the case was the extent of the authority of Mr. Williams to bind appellant. The trial court found that Mr. Williams had full and complete authority as speaking agent to represent appellant for all purposes in connection with the repair, alteration and renewal of the "Urania" (Aps. 83). On this appeal, appellant has

abandoned its contention that the authority of Mr. Williams was limited in any way, and the trial court's finding concerning the extent of Mr. Williams' authority is the law of the case.

Mr. Williams' testimony before the District Court fully established that all work done in connection with the main engine was to be done and was in fact done under the supervision of the vessel's chief engineer (Aps. 326-7). This work, of course, included the cleaning and testing of the oil cooler. Mr. Williams' testimony was fully corroborated by other witnesses, namely, Mr. Lindgren (Aps. 293), Mr. Woodman (Aps. 1462), and Mr. Oakland (Aps. 1437, 1441), and by the written survey report of Mr. Williams to appellant (Aps. 349). The fact of the cleaning and testing is also recorded in the vessel's engine log, the entries of which were made in the Greek language by the chief engineer, under whose supervision this work was done. This log entry, dated September 4, 1948, was translated by appellant's director, Demetri Antippas, as follows: "Cleaning and testing by hydraulic pressure of the oil and water cooling radiator of main engine" (Aps. 1426). There is no testimony in the record to the contrary, by deposition or otherwise. Surely the bare assertion of the chief engineer that the "work" was done by appellees' employees is insufficient to raise a contrary inference. Indeed, this testimony is entirely consistent with the Court's finding. The well settled rule of this Court that a district court's finding, based solely on live testimony, cannot be upset unless clearly erroneous, applies to this finding. Based as it is on uncontro-

verted testimony, it can hardly be argued that the finding is "clearly erroneous." See O'Brien, Manual of Federal Appellate Procedure (3rd ed. 1941) 112-13, and cases cited therein.

Appellees' pipe shop foreman, Walter Oakland, testified that the work accomplished by him in the cleaning and testing of the cooler was done at the request of and pursuant to the directions of the chief engineer in strict accordance with contract stipulation. His testimony, which is nowhere disputed, shows that the chief engineer stopped him one day aboard the vessel and requested him to clean and test the heat exchangers and lubricating oil cooler (Aps. 1437). Furthermore, the chief engineer prescribed specifically the amount of pressure to be used in testing the same (Aps. 1437). These instructions were carried out, the cleaning accomplished and the test applied as prescribed (Aps. 1438-39). Mr. Oakland then reported to the chief engineer, requesting that he inspect the heat exchangers and oil cooler while under hydrostatic test, and the chief engineer thereupon sent his assistant engineer to examine them. The examination was made by the assistant engineer and by Mr. Frank Gallagher, the American Bureau of Shipping surveyor (Aps. 1439) in Mr. Oakland's presence and no leaks were found (Aps. 1440). Mr. Gallagher, who attended the vessel for classification purposes while the same was at appellees' yard, corroborated Mr. Oakland by deposition testimony to the effect that he remembered witnessing the test described (Aps. 1693). Mr. Gallagher's report of survey (Libelants' Exhibit No. 17) confirms his testimony, disclosing

that the oil cooler and heat exchangers were examined by him and found in good condition (Aps. 1658-59). Mr. Williams, who supervised the entire job for appellant stated also that the cooler was cleaned and tested (Aps. 362).

Since appellant's claim for damages resulting from main engine breakdowns is based solely upon alleged negligence in the cleaning and testing of the lubricating oil cooler, and since all work performed by appellees' employees was as borrowed servants, their acts as such were the acts of appellant. The rule of law applicable to the instant situation is set out in American Jurisprudence as follows:

> "One who has the status of general servant or employee may be lent or hired by his master to another for some special service so as to become, as to that service, the servant of such third person, the test being whether, in the particular service which he is engaged to perform, he continues to be under the direction and control of his master or becomes subject to that of the person to whom he has been lent or hired. Where an employee, with his consent, has thus been lent by his general employer to another person, he is deemed to have become, for all purposes of the relationship of master and servant, the employee of the borrower. For the time being, he is subject to the borrower's control and direction. However, the conclusion as to his status is the same regardless of the showing as to whether the person to whom he has been lent actually exercises his right of control or direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill

for the result." 35 Am. Jur. 455-56, Master & Servant, Sec. 18.

The same principle is enunciated in the Restatement of Agency, Sec. 227, Servant Lent to Another Master, as follows:

> "A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others."

Illustration 3 (page 503) under the section quoted above is as follows:

> "P, a master carpenter, by agreement with B, sends A, a skilled cabinetmaker, to work with B's servants for a week, under the direction of B's foreman, in the reconstruction of a stairway. For this B is to pay P an agreed amount. A acts as the servant of B in building the stairway."

Two illustrative cases applying this principle to work aboard ships are *The Commandant*, 23 F.(2d) 100 (D.C.Md. 1928) and *Atlantic Transport Co. v. Coveys*, 82 Fed. 177, 28 C.C.A. 388 (C.C.A.2nd 1897).

The only negligence for which a lending master can be held is for "knowingly furnishing an incompetent servant." 39 C.J. 1277, Master and Servant, Sec. 1462. But appellant has never charged appellees with this type of negligence, nor would the proof support it if such a charge had been made.

Furthermore, since appellant's chief engineer specifically prescribed the test to be applied, appellant is in no position to challenge the sufficiency thereof. Thus, in 9 C.J. 754, Building and Construction Contracts, Sec. 88, it is written:

> "The builder is not responsible for defects arising from doing the work in the manner directed by the owner or his authorized representative, or which are caused by acts of the owner during the progress of the work."

The District Court's finding of fact concerning the extent of the contractual duty assumed by appellees, together with its companion finding that the work was actually done in strict accordance with contract stipulation is based on live undisputed testimony. No question of credibility of witnesses is involved. From these findings it follows as a matter of law, applying the well settled principles above set forth, that the acts of appellees' employees, while engaged in work on the lubricating oil cooler, were the acts of appellant. This being so, appellant's case fails at the very outset.

2. Assuming *arguendo* appellees had a contractual duty and responsibility for the acts of its employees in performing work on the main engine, no breach of duty, either contractual or tortious, was established.

We believe that this Court will find it unnecessary to consider this proposition, since the issue of appellees' duty, if decided in appellees' favor, will be decisive of this appeal. However, appellant has attacked the District Court's finding that the services of appellees' employees furnished to assist the vessel's chief engineer were competent and done in a workmanlike manner. We shall proceed, therefore, to discuss the evidence relating to this alleged negligence and incompetence.

Appellant's own representative, Harry F. Williams, who supervised the entire job, including the main contract and all additional work, testified that the work of appellees was done in a competent and workmanlike manner. Moreover, all work was approved upon completion not only by Mr. Williams, but by Mr. Gallagher, the surveyor for the American Bureau of Shipping (Aps. 595-6), who was requested by appellant to survey the vessel (Aps. 1630-31).

We are here concerned specifically with the finding of the Court as it relates to the competence of Walter Oakland, appellees' pipe shop foreman, and whether the work accomplished on the lube oil cooler was properly performed. As to his competency to do this work, there can be little question, as he had held this position for thirty years in the same repair yard (Aps. 1434) during which time he had cleaned and tested hundreds of coolers of various types (Aps. 1435). J. D. Gilmour (incorrectly spelled "Gilmore" in the apostles), a marine surveyor whose qualifications were quickly conceded by appellant (Aps. 1481), testified that he had known Mr. Oakland since 1923 or 1924 and had always found his work most satisfactory (Aps. 1483). The circumstances under which Mr. Oakland undertook the cleaning and testing of the lube oil cooler have already been related. The cleaning and testing method used was described by him in detail (Aps. 1438-41). Mr. Gilmour testified (1) that the solution used by Mr. Oakland in the cleaning process had an excellent reputation for effectiveness in cleaning pressure vessels (Aps. 1485), (2) the method used in testing the cooler in question,

"was a good, fair pressure test," conforming to good marine practice (Aps. 1487), and (3) the methods followed were standard practice in cleaning any heat exchanger, lubricating oil cooler or fuel oil heater (Aps. 1488). Frank E. Blumberg, a licensed professional engineer in mechanical and marine engineering and naval architecture, whose qualifications included nearly seven years as assistant engineer at Todd Pacific Shipyards, Seattle Division, in charge of its engineering department, testified to the same effect (Aps. 1560).

In the face of direct proof establishing that no leaks existed in the cooler when tested by Mr. Oakland in the presence of the vessel's engineer and Mr. Gallagher, appellant asks this Court to indulge in the highly speculative inference that because leaks were found more than two months after the cleaning and testing had been completed, they must have existed when Mr. Oakland's test was applied. This speculation, moreover, would require this Court to ignore the evidence of intervening acts and events which could have caused the leaks which were later discovered, and as a legal proposition to hold appellees were insurers against the contingency of such supervening causes. To overcome the weight of the District Court's finding, appellant urges that it is lessened because some of the testimony covering this matter was given by deposition. But the deposition testimony involved does not compete with the testimony heard by the District Court. Mr. Oakland was the only witness heard by the District Court on the question of the actual cleaning and testing. There is no deposition

testimony disputing that his work was accomplished in the manner described by him, and indeed, his testimony is corroborated by the deposition of Mr. Gallagher (Aps. 1672, 1693) and inferentially by the vessel's engine room log entry of September 4, 1948 (Aps. 1426).

Appellant emphasizes that the oil cooler contained a stamp on the exterior describing a 300-pound pressure test on the salt water side (Appellant's Br. 22). This is based on the testimony of Mr. Antippas that he saw the stamp the day before his testimony. To begin with, it should be noted that Mr. Antippas' only information as to the stamp was from looking at an exhibit which was rejected by the trial court for want of proper identification. If the exhibit itself was inadmissible as insufficiently identified, the testimony of Mr. Antippas as to a stamp on the exhibit would appear to be doubly incompetent, as hearsay evidence based on information gathered from an improper source.

The appellant quotes from the operating manual for the main engine (Appellant's Br. 23), wherein information relative to the lube oil cooler is set out. This information, described as performance data, shows test pressure (with water) 200 p.s.i. It is not clear which of the two tests appellant thinks is correct, 300 p.s.i. or 200 p.s.i., but it is abundantly clear from the testimony that none of this data is applicable in determining whether a proper test was used by Mr. Oakland. The evidence shows that the lube oil cooler was operated by pumps delivering an operating

pressure of approximately 20 pounds per square inch on the oil side (Aps. 878) and 7 pounds per square inch on the salt water side (Aps. 880). The engine room log (Respondent's Exhibit A-12) discloses that during the "Urania's" voyage, a pressure of 18 p.s.i. on the oil side and 7 p.s.i. on the salt water side was maintained uniformly between October 16 and October 26, 1948 (Also see Aps. 1376). Mr. Blumberg, former Assistant Chief Engineer of Todd Pacific Shipyards, testified that (a) considering operating pressures of the lube oil cooler, the tests used by Mr. Oakland were satisfactory and conformed to general shipyard practice in the Northwest (Aps. 1560); (b) the test was proper even assuming a nameplate prescribed a 300 pound pressure because such plates indicate the factory test and are used to prove the factory's own design and workmanship (Aps. 1560-61); and (c) it is not the practice in shipyards to test at the pressures prescribed by the factory, but to test according to the use which the apparatus is to be put (Aps. 1561). Mr. Gilmour testified that the pressure test of the cooler in question would be adequate if one and a half times greater than the maximum operating pressure to which the cooler was subject (Aps. 1488). Mr. Gilmour also pointed out that this type cooler can be used for many purposes and that the pressure noted on the name plate would be the maximum pressure to which the apparatus could be safely subjected (Aps. 1488). Mr. Herman Sanwick, formerly chief engineer of Rear Admiral Richard E. Byrd's flagship on the United States Antarctic Expedition, and during the war, chief testing engineer for the Wins-

low Marine Railway and Shipbuilding Co. where he had charge of the testing of seventeen diesel-powered vessels built for the United States Navy, testified that the practice in pressure testing heat exchangers or coolers is to apply twice the working pressure on a new installation, and that on a used installation, Coast Guard inspection requirements are one and a half times the working pressure (Aps. 1610). Mr. Oakland, who had 30 years experience in cleaning and testing this kind of equipment, stated that the pressure test would depend on the amount of working pressure and that the American Bureau of Shipping rules prescribe a test of twice the operating pressure of the particular unit, but not less than 15 pounds (Aps. 1441-42). Perhaps nothing illustrates the absurdity of appellant's claim that the test was improper more clearly than the testimony of appellant's general agent and representative, Mr. Williams, a man of 40 years experience in the marine business, who testified that a hydrostatic test equal to the working pressure of the cooler would be suitable (Aps. 362).

Not only was Mr. Oakland's work accomplished in a workmanlike manner but the method used was directed by appellant through its agent, the chief engineer. It is scarcely conceivable that the American Bureau of Shipping surveyor, Mr. Gallagher, would have approved the test and reported the cooler in good condition (Aps. 1658-9) had the test been improper. The performance of the lubricating oil cooler, subsequent to its installation after cleaning and testing at appellees' yard, gives further support to the District Court's findings. Mr. Gallagher testified that temper-

ature results obtained by use of the cooler during the sea trial were satisfactory (Aps. 1672). Mr. Antippas, director of appellant corporation, reviewing the engine room log for the period between the vessel's sailing date, October 15, and October 26, the date of the first breakdown, said that temperatures and pressures were within normal operating range prescribed for the main engine (Aps. 1376). Even the witness Cross, of the Union Diesel Engine Company, who went aboard the vessel at Manzanillo to effect repairs and who remained aboard until the vessel returned to Los Angeles, testified that the lube oil cooler functioned properly during that trip, a period during which appellant contends leaks were causing contamination to the oil cooler (Aps. 1060).

Appellant's own expert, Mr. Dupuy, who surveyed the vessel for Lloyds' agents when it arrived at Los Angeles from Manzanillo under tow, testified it was customary to test the top by the working pressure of the particular unit (Aps. 1216). Of even greater significance is the fact that after he had learned of the leaks in the cooler, he recommended that it be soldered where leaking and proven tight upon completion of its repairs with a hydrostatic test of only 100 pounds (Aps. 1216, 1327), in spite of appellant's claim that any test short of that prescribed in the operating manual or on the name plate would be negligent.

With respect to appellant's contention that this cooler was excessively dirty when opened up at Los Angeles, it is simply without substance, as Mr.

Pike, one of appellant's expert witnesses, examined it and stated unequivocally that it was only normally dirty to the extent that would be expected after a 2400 mile voyage (Aps. 1187-88).

There is a complete absence of any credible evidence that Mr. Oakland's test was improper in any way or that leaks were present when he cleaned and tested the cooler. But there is considerable evidence that the leaks were caused at a later date. Appellant's expert, Mr. Pike, who surveyed the vessel at Los Angeles, testified there were lots of possible causes for leaks developing in the seams of the cooler, including excessive vibration of the engine (Aps. 1191). Mr. Sanwick stated that a defect in the solder could cause it to break loose and develop leaks around the seams and that vibration of the engine could effect such leaks (Aps. 1611). Mr. Blumberg stated that engine vibration or improper installation of the cooler or action of salt water could create such leaks (Aps. 1566).

There is persuasive evidence that the leaks may have been developed in the process of cleaning and testing the cooler at Los Angeles. The leaks discovered there in the testing process were of such minute size as not to be visible with the naked eye, this having been established by appellant's own witnesses, M. F. Newell (Aps. 1109), who observed part of the test, William H. Weiler, who did the cleaning and testing (Aps. 1125), and Mr. Pike, who looked at the cooler before its removal from the vessel (Aps. 1187). The cooler consists of a core made probably of cupro-

nickel (Aps. 1520), which is contained within the housing or casing made of bronze (Aps. 1099), the core being soldered to a plate, which in turn is soldered to the housing (Aps. 1133). It was in these soldered seams that the leaks occurred (Aps. 1136-37). Before the testing was conducted, the cooler was immersed in a solution and boiled for three or four hours at 212 degrees Fahrenheit (Aps. 1127-28, 1138). Upon completion of the boiling the cooler was submerged in water, and air pressure ranging from 160 to 200 lbs. per square inch was applied to the inside of the cooler on the water side (Aps. 1122-23). This test disclosed leaks in the soldered seams evidenced by air bubbles no larger than the thickness of the lead in a pencil (Aps. 1141). The witness Weiler, who conducted the test, frankly observed, "They were such high pressure that it wouldn't take much of a seam to—that is, much of an opening for them to leak" (Aps. 1125). With respect to this whole procedure, Mr. Blumberg testified that (a) because of the unequal co-efficient of expansion in the different metals, such boiling procedure could produce the leaks discovered upon testing (Aps. 1566), (b) an air pressure test under water is used to show porosity only, and that a hydrostatic test of one and a half to two times usual working pressure is used to show both leaks and strength (Aps. 1567), and (c) the test described was an extremely severe one (Aps. 1567) and should be applied to a pressure vessel that would have had a previous hydrostatic test of 800 to 1000 pounds (Aps. 1568).

In summary, we submit (1) that Mr. Oakland's

work was competently performed in accordance with accepted practice, (2) the record is devoid of evidence that leaks existed at the time of cleaning and testing by Mr. Oakland, (3) whatever the merit of the test applied by Mr. Oakland, it was the test selected and directed by appellant.

3. Assuming *arguendo* (a) that appellees had a contractual duty or obligation, and (b) that such duty was breached, appellant wholly failed to establish or sustain proof that its damages were proximately caused by such breach.

The best analysis of this phase of the case is contained in the District Judge's opinion at the close of the trial (see Aps. 1722-1725), which analysis may be epitomized in the following observation of the Court:

> "The Court is not entirely convinced by the evidence as to just exactly what was the cause of that engine trouble or of the galling of those gears, but I am convinced of one thing, and that is, of the failure of the cross libelant to sustain the burden of showing, by a preponderance of the evidence, just what the cause was." (Aps. 1723)

Appellant produced four expert witnesses on whose opinion as to cause of the main engine breakdowns it rests the causation phase of its case. It is true that these witnesses saw the vessel upon its return to Los Angeles, an opportunity which appellees did not have because of appellant's unexplained (Aps. 1416) neglect to advise appellees that breakdowns had occurred and that attempt would be made to fasten liability

therefor on appellees. This neglect is even harder to understand in view of the fact that a libel action by appellees against the vessel to recover their repair bill had been pending for almost one month (Aps. 4). Nevertheless an analysis of the testimony of these witnesses will disclose that to the extent that they held opinion as to cause, such opinion was speculative only. Furthermore, they admitted that other causes had not been fully or properly explored.

The "Urania" was powered by a Union Diesel engine. The vice-president of the engine company, S. W. Newell, whose interest in protecting the reputation of the engine is apparent from his testimony, although called by appellant, stated flatly that the cause of the breakdown could not, under ordinary operating conditions, have resulted from leaks in the oil cooler (Aps. 937). His reason for this opinion was that even if there were leaks in the cooler, salt water could not enter the oil because of the higher operating pressure of the oil (18 p.s.i.) as opposed to the sea water coolant (7 p.s.i.) (Aps. 937).

Mr. Summers, a marine surveyor called by appellant, although expressing opinion that oil contamination because of leaks in the cooler was the cause of gear failure, nevertheless testified that (a) he didn't go into any real analysis of ultimate cause after finding what he thought was the "meat" of the trouble (Aps. 1257), (b) in giving his opinion which, he emphasized, was merely an opinion, he had to theorize, "because there are so many sides to it and we may or may not be correct in the opinion" (Aps.

1267-68), (c) he could have made a much more thorough analysis of the ultimate cause had he known the matter was to be litigated (Aps. 1279-80), (d) an overload of the timing gears could cause shaft deflection and galling of such gears (Aps. 1275).

The third expert called by appellant, Mr. Pike, the American Bureau surveyor, refused to give an opinion as to the cause stating that while poor lubrication could be a cause along with foreign matter or overheating, "I mean there was no one opinion I could give. I would not state my opinion of the thing, because that would not be fair" (Aps. 1181).

The opinion of appellant's fourth expert, Mr. Dupuy, was expressed in his report (Respondent's Exhibit A-22) "Because of the leaking lube oil cooler and the salt water found in the lube oil system it appears that the failure of the timing gears was caused by this condition" (Aps. 1329). However, he admitted that (a) he never sampled the oil remaining in the pockets of the engine bed himself to determine its condition (Aps. 1210), nor did he observe the leaks, this fact having been reported to him by others (Aps. 1218); (b) there could have been very many other causes for the gear failure (Aps. 1219); (c) salt water couldn't get into the oil through leaks in the cooler while operating if the oil pressure was higher than the water pressure, and he did not even know what the pressures were in this cooler (Aps. 1234); and (d) he would have recommended placing spare timing gears aboard after the repairs were made because of the trouble that had been experienced (Aps. 1224).

A summation of this testimony is that appellant's witnesses, Mr. S. W. Newell and Mr. Dupuy, have repudiated appellant's theory that the oil became contaminated through leaks in the cooler, because the salt water under a low pressure could not enter the higher pressure lubrication oil zone through minuscule leaks in the cooler. Mr. Pike refused to give an opinion, reflecting a view that the real cause could not be established. This leaves appellant clinging to the testimony of Mr. Summers, who characterized his own opinion as a mere theory, there being so many sides to the possible causation.

Arrayed against the vestige remaining of appellant's theory is the expert testimony of J. D. Gilmour, a professional engineer and marine surveyor of over thirty years experience who testified that (a) if the cooler had leaked under the operating pressures of 18 pounds on the oil side and 7 pounds on the salt water side, the oil would have flowed into the salt water coolant and overboard, and the salt water couldn't have entered the oil (Aps. 1496); (b) the construction of the cooler aboard the "Urania" is such that the seams where the leaks were discovered are covered by a gasket which would have prevented any leakage at all (Aps. 1496); and (c) if the lubricating oil had been contaminated, the first parts of the engine to be affected would have been the main, crankshaft and cross-head bearings, because of the babbit metal contained in those parts, and the greater burden borne by them (Aps. 1496, 1503).

Mr. Frank E. Blumberg, an expert witness called

by appellees, not only fully corroborated the testimony of Mr. Gilmour, but stated that it would not be possible for salt water at 7 p.s.i. to penetrate leaks of the size alleged to have been found at Los Angeles, and that he had serious doubts whether water would get through such leaks even if a pump capable of delivering one hundred pounds pressure were applied to the salt water side of the cooler (Aps. 1568-69).

Mr. Herman Sanwick, outstanding Diesel engine expert, stated that salt water could not infiltrate through leaks in the cooler where the pressure of the oil was higher than the pressure of the water (Aps. 1620).

How can it possibly be said on this state of the record that appellant has sustained proof as to its theory of causation, especially when two of its four experts have expressly denied its possibility? And further weakening the slender thread, three of those experts admit the probability of other causes.

An indispensable condition to the establishment of appellant's theory would have been proof that the lubricating oil was in fact contaminated by salt water to an extent sufficient to cause gear failure. But the only oil sample chemically analyzed, even though taken from the pit of the engine (Aps. 1076, 1080) was, according to witnesses called by both sides [Summers (Aps. 1283-86), Blumberg (Aps. 1586-7) and Gilmour (Aps. 1499-1500)] of sufficient viscosity to lubricate properly the main engine of the "Urania." These three gentlemen were the only witnesses whose professional opinion was elicited as to the qualities

as a lubricant of the oil sample. Mr. Gilmour testified that the sample analyzed, taken as it was from the bottom of the engine, would be of poorer quality than the oil in circulation in the engine (Aps. 1500).

Appellant cites at length in its brief what it deems to be proof by its experts of the contamination of the oil, based upon visual and taste examination (Appellant's Br. 13-15), but its brief is strangely silent as to the only scientific test made, even though this test was taken at appellant's request and offered and introducd into evidence by it. It is also curious that an oil sample purportedly taken from the system prior to the vessel's arrival in Los Angeles was thrown overboard by the steward (Aps. 1417).

One need not be a lubrication expert to know that the lubricating qualities of oil cannot be determined by a subjective visual or taste test. Indeed, Mr. Summers, the senior surveyor called by appellant, although testifying that from a taste of the oil he believed it to have salt in it, gratuitously added that "such determination should be further confirmed by a laboratory test" (Aps. 1251). Subsequently, when Mr. Summers was presented with the oil analysis, he declared that an oil of the viscosity shown on the test would be adequate to lubricate the main engine of the "Urania" (Aps. 1283-86). Thus the last remaining thread offered to support appellant's theory of causation, to-wit, the speculative opinion of Mr. Summers, is severed by his later opinion based on scientific analysis.

The history of the "Urania's" engine operations

preceding the two breakdowns also contradicts any theory that salt water contamination of the oil through a leaking oil cooler could have caused the failure of the timing gears. The main engine functioned normally during continuous voyage at sea from the time of the vessel's departure from Puget Sound on October 15 until October 26, when the first breakdown occurred (Aps. 1369-73). On October 25, the day prior to the breakdown, the lubricating oil of the main engine was changed (Aps. 1372). In the absence of any erratic performance of the engine prior to October 25, it is simply not possible that progressive galling of the gears could have occurred and it is equally inconceivable that contamination of sufficient degree could have occurred after the oil change, in one day, through infinitesimal leaks in the oil cooler, sufficient to rupture case hardened steel helical timing gears. Herman Sanwick, by his qualifications the foremost authority on Diesel engines presented as a witness in the entire case, testified that any progressive contamination of the lubricating oil would increase the friction in the moving parts of the engine, which would in turn increase the temperature of the main bearings, and further, that in the absence of an increase in the main bearing temperatures, contaminated lubrication could not be the cause of timing gear failure (Aps. 1613-14). During the period from October 16 through October 25, the temperatures and pressures for the main engine were within normal operating range (Aps. 1376). See also the engine room log (Respondent's Exhibits A-12 and A-13).

Another persuasive fact which militates against

the theory of progressive contamination as a cause is the suddenness with which the second breakdown occurred. After the new timing gears had been installed and the lubricating oil changed again at Manzanillo, the "Urania" sailed at approximately 4:40 p.m. on November 3. About 27 hours later and at 7:00 p.m. on November 4, the engine was stopped for an inspection of the timing gears by Mr. Cross, the Union Diesel Engine Company service man aboard, and the same were found in good order. At 3:50 a.m. the following morning, approximately 9 hours later, the engine was stopped owing to erratic performance and the lower timing gears were found to be galled (Aps. 1343 and Respondent's Exhibit A-22).

Other probable causes.

While there is, after analysis, neither evidence nor inference left to support appellant's theory as to the cause of the engine breakdowns, there is much in the record to suggest the probability of other and more obvious causes. To begin, it is noteworthy that the service representative sent by the Union Diesel Engine Company, Mr. Cross, was ordered to Manzanillo with no responsibility to ascertain the cause of the gear failure, his orders specifically limiting him to the installation of a new set of timing gears (Aps. 966, 1062). His orders also directed him to return the vessel to Los Angeles (Aps. 1062, 977-78). He testified that the chief engineer had advised him upon his arrival that he had "done something" to one of the lubricating oil lines leading to the timing gears (Aps. 1030). Mr. Cross also found this oil line had

been carefully cleaned out prior to his arrival by the chief engineer, from which fact, together with his other conversations with the engineer, he gathered that this oil line had been plugged up (Aps. 1030). More concrete evidence of this condition is contained in the telegram from the master of the vessel in Manzanillo to Mr. Demetri Antippas on October 31, 1948. The full text of the telegram is as follows:

> "Union Diesel serviceman arrived 7:30 P.M,. October 30. Made inspection. Stop. Appears lubricating oil line had clogged up at some previous time and gears galled. Stop. Carried ashore vertical shaft in lathe and straightened slight bend. Stop. Making new model changes to governor to improve its function. Stop. Will proceed with repairs advising progress. BEIS."

(The telegram is contained in Exhibits A-9 and A-10, which were admitted in evidence (Aps. 1397) but not printed in the Apostles (Aps. 139-140)).

In this connection, appellant ingenuously called attention in its brief to a serious indictment of the competency of the engine room personnel and officers by Mr. Cross (Appellant's Br. 28). Thus, in a wire from Manzanillo to his superiors, he states "All Air Water Lubricating Oil Tubing Should Be Replaced Stop Bearings Liners Pistons Etc Should Have Very Close Inspection Stop" (Aps. 1042). In his testimony, Mr. Cross said that a large portion of this tubing aboard the vessel was "badly kinked," that the control station didn't work properly, that the fuel was not set to his satisfaction, that he recommended that the nozzles be taken out and finally

that the engine had been running hot and that he did not know what the cause was (Aps. 1042-44). These serious conditions either existed prior to the ship's departure from appellees' yard or were created at sea. The fact that the vessel successfully passed rigorous examination and inspection, together with both a sea trial and dock trials, is conclusive evidence that the conditions did not exist prior to sailing from appellees' yard. According to Mr. Cross, the condition of the tubing was externally visible (Aps. 1045). Had these conditions been present when the "Urania" left appellees' yard, it is unbelievable that she would have been approved for classification by Mr. Gallagher (See his detailed report of survey, Aps. 1650-1663) and approved and accepted by appellant's representative, Mr. Williams, whose very function it was to supervise the work (Aps. 595-596). Such an improbable assumption cannot be made, all evidence being to the contrary, but even if it were, the main engine work was entirely the responsibility of the appellant, as already noted herein. The inescapable facts are that these conditions were created after the "Urania's" departure from appellees' yard by misfeasance or nonfeasance of the ship's crew. This inevitable conclusion is directly supported by appellant's own admission contained in the deck log (Respondent's Exhibit A-8) entry for 1100 hours, October 29, 1948, the "Urania" then lying at Manzanillo, which reads "Ship's engineers refused to dismantle the necessary parts. We hired two machinists from shore and done the job" (Aps. 1331). Additional doubt is cast on the competency of the chief engineer

by the incident wherein he was removed from the throttle of the main engine during the trial run at the request of Mr. Gallagher of the American Bureau of Shipping (Aps. 384).

We turn now to a consideration of the conditions described by Mr. Cross and their probable relationship to the cause of the breakdowns. If the oil line leading to the timing gears was plugged as seems probable in view of the telegram sent by the master to appellant, this fact would have caused the gear failure. The kinking of lube oil lines (copper tubing) could have had the same effect (Cross, Aps. 1050; Blumberg, Aps. 1576). It is apparent that the abortive measure adopted by Mr. Cross of installing an additional lubricating oil line to the timing gears (Aps. 1050-51) was ill considered and adds nothing to appellant's theory of causation. If practically all the lubricating oil lines were badly kinked and such kinking could choke off the oil supply to the gears, and indeed to the additional oil line installed by Mr. Cross, nothing short of complete replacement or repair to such lines would eliminate the probability of the kinking of these lines as a cause (See Aps. 1592).

The testimony of Mr. Cross also discloses that the engine had been overheating prior to the first breakdown (Aps. 1029) and prior to the second breakdown, when he was aboard the vessel (Aps. 1046). He was unable to explain the cause of the overheating (Aps. 1044, 1061). Mr. Blumberg testified that the overheating of the engine in itself could cause

the galling of the gears (Aps. 1580) and the failure to ascertain the cause of the overheating prior to sailing from Manzanillo, was a serious departure from good Diesel engineering practice (Aps. 1585-6).

Another probable cause of timing gear failure which appellant has failed to discuss relates to excessive pressure or overloading of the timing gears resulting from improper adjustments of auxiliary equipment driven by the vertical shaft engaged by the timing gears. The fuel pump on the "Urania" was connected with the assembly of which the timing gears are a part (Respondent's Exhibit No. A-16). Significantly, the engine room log discloses that the main engine was shut down twice prior to the first breakdown for purposes of repacking and tightening of the packing in the fuel pumps (Aps. 1371-72). Mr. Blumberg testified that excessive tightening of the fuel pump which is driven by the helical timing gears would cause the fuel pump shaft to be restrained by friction thus transmitting an excessive load to the timing gears (Aps. 1577). Excessive loading of these gears or "binds" in the system were advanced by the experts as a common cause of such gear failure (Aps. 1576-77, 1275).

Appellant has made certain observations in its brief concerning the integrity and ability of appellees and their employees in an apparent attempt to bolster its theory. An examination of each of these points will reveal how ill-founded they are. First it is asserted that appellees failed to furnish a factory representative to supervise operation of the engine although re-

quired to do so by the specifications (Appellant's Br. 28). But appellant's representative, Mr. Williams, testified that he had ordered this item as a convenience to appellant, that the representative he wanted was at sea at the time and in consequence it was not fulfilled. Further he stated that the failure to delete this request from Libelants' Exhibit 4, was merely an oversight both on his part and that of appellees (Aps. 324, 325). Again at page 29 of its brief appellant recites the testimony of M. L. Newell wherein he expressed an opinion that because of the hardening of the paint on the bolts on the coolers it must have been at least a year since they had been removed, implying that the coolers had never been cleaned and tested during such period. In evaluating this testimony it is well to remember that this witness was by occupation an engineer on a fishing boat, did not hold an engineer's license, had only five years experience on fishing boats and is the brother of Mr. S. W. Newell, vice-president of the Union Diesel Engine Company who hired him to work on the "Urania" when it arrived at Los Angeles (Aps. 1087-88). Appellant nevertheless cites this testimony against that of (a) Mr. Williams who stated the coolers were cleaned and tested at appellees' yard (Abs. 362, 577-78), (b) Mr. Gallagher who saw the testing (Aps. 1693) and reported his examination of them and their good condition in his survey report (Libelants' Exhibit No. 17, Aps. 1658-59), (c) Mr. Oakland who did the cleaning and testing (Aps. 1437-39) and (d) the "Urania's" engine room log (Respondent's Exhibit No. 12, Aps. 1426) which recorded the cleaning

and testing of the coolers. In view of the record, Mr. Newell's entire testimony is subject to serious question. As to Mr. Weiler's testimony (Appellant's Br. 29), it adds nothing to that of Mr. Newell. Mr. Weiler cleaned and tested the cooler and repaired the leaks where found. He was not asked whether he could tell if the cooler had been recently cleaned and tested, but whether it had recently been repaired (Aps. 1126). The cooler was not repaired at appellees' yard, but merely cleaned and tested.

Appellant cites the trial judge's comment on what he considered to be lack of personal recollection of appellees' employees in three instances, as a reflection on the candor of such witnesses (Appellant's Br. 29), but appellant neglects to set out the trial judge's observations immediately following the quoted comment wherein he states:

> "Yet, I am convinced, from a consideration of all the evidence and by a preponderance thereof, that one of the reasons why some of these foremen or subforemen may not have retained in their minds in minute detail what they personally did or saw done in connection with the repairs, was that they were doing so much of the work under direction of ship officers or personnel, notably the chief engineer or persons in the engine room department, and they were doing the work in detail as ordered rather than in accordance with written specifications or what the foremen or subforemen thought should be done. Consequently, in such instances, the final functioning of a repaired unit was not to be so much in accordance with the satisfaction of a foreman or subforeman, but was to be rather for the ap-

> proval of Mr. Williams and Mr. Gallagher or as required by a department of the ship or its head particularly interested in the specific item." (Aps. 70-71)

Because of the technical nature of much of the testimony, it is not feasible within the limits of this brief to explore the complex factors which bear directly upon the ultimate cause of the engine failure. Appellees do not contend that the evidence in support of the other probable causes of breakdowns is sufficient to establish the true causation, by a preponderance. However, we do contend that such evidence provides abundant proof that the true cause was never established and that it illustrates clearly how inadequate were the premises upon which certain opinions were ventured by the witnesses called in appellant's behalf. Many questions are posed in the record, scientifically reliable answers to which might have been given had the primary evidence been preserved for the trial. An examination of the record reveals that many vital facts concerning the history of the "Urania's" voyage and breakdowns, indispensable to the formulation of a trustworthy expert opinion as to causation, were unknown to appellant's witnesses when their speculative opinions were given by deposition prior to the trial. Much of the primary evidence, for reasons known only to appellant, was never preserved. Neither set of the galled timing gears was available at the trial. Despite the entry of an order by the District Court on March 9, 1948, directing appellant to produce "on or before the 14th day of March, 1949," all parts removed from the "Urania",

(Aps. 56-58) the lube oil cooler was not made available to appellees until late on the last day of the trial, April 18, 1949, after appellees had closed their case. Even then proof was entirely lacking that the cooler produced was from the "Urania". Finally, appellant failed to preserve any representative oil sample. The quality of the only sample scientifically analyzed was found to be of sufficient viscosity to lubricate the engine, and this sample was taken from the very dregs of the oil in the engine. Perhaps if the gears, cooler and oil had been available for analysis by metallurgists and lubrication experts, the true cause of the breakdown might have been scientifically established. Such failure to preserve and produce the primary evidence for appellees and the court, the evidence upon which its action was based, is entirely consistent with the conduct of appellant in attempting to sail the ship from appellees' yard without notification to appellees and without making provision for the payment of its repair bill, the balance of which was $64,366.75 (See Aps. 212-15, 388, 390-91, 536-37). It is unnecessary to detail what a task appellees might have had in collecting their bill from a Panamanian corporation owned by Greek interests had the ship been successful in leaving for foreign waters (See Aps. 683-84), before arrest by the United States Marshal.

Perhaps nothing argues more persuasively that the real cause of engine failure was not established than the fact that after the repairs at Los Angeles, appellant felt it was necessary to stow an extra pair of timing gears aboard the vessel and send the engine

company's representative, Mr. Cross, with the ship to Manzanillo (Aps. 1223-24, 1019). Certainly if the cause had been established to appellant's and the engine manufacturer's satisfaction, there would have been no necessity to send Mr. Cross on his second long journey to Manzanillo. The only explanation for Mr. Cross' second trip, if the cause had been found in Los Angeles, would have been to teach the crew proper engine maintenance. The crew's previous profound disinterest in the welfare of the engine is imbedded in the log's statement that the crew *refused* to work on the engine (Aps. 1331). And their incompetence, even if they had been interested, is borne out by the fact that they could not even steer the vessel out of the Straits of Juan de Fuca, but had to put into Port Angeles for assistance in adjusting the telemotor (Aps. 656). It is small wonder that the master was relieved of his command, which was, incidentally, his first "experience with a Diesel powered vessel" (Aps. 691), on November 14, 1948, while the ship was at Los Angeles undergoing repair (See Aps. 641, 689). This fact seems to have been forgotten by Mr. Antippas, who testified that Captain Beis was removed by him from the "Urania" "to make his deposition" while she was in New Orleans (Aps. 545).

Clayton Heating Boiler

Appellant's claim relating to this item is grounded primarily on the hearsay testimony of the witness Biehler. What renders his testimony entirely irregular is that its important portions relate not even to hearsay facts, but to hearsay opinions—informal unsworn

statements by others to a witness who gratuitously admitted that "my memory isn't too good" (Aps. 821, 827, 829). Appellees had no opportunity to cross-examine the person or persons who actually effected the repairs either as to their qualifications to formulate opinions as to causation, or the facts upon which such opinions were based.

When the ship arrived in Los Angeles, the boiler pump was found to be damaged and Mr. Biehler, the manufacturer's representative, removed the pump from the ship to the manufacturer's shop for repair. Mr. Biehler testified that although he was not present at the time the pump was repaired, some unidentified person in the shop reported to him that in his (the unknown person's) opinion, the cause of the damage found was the failure to reassemble certain pump heads according to the manufacturer's markings (Aps. 827-28).

The only other evidence presented by appellant as to causation was the testimony of the vessel's chief engineer, who, when asked whether he or his crew repaired or cleaned the pump in any way, replied, "I myself dismantled it and found some broken parts or pieces" (Aps. 744).

From the foregoing statements, one part gossip and the other self serving, appellant contends the trial court's finding that appellant failed to sustain proof of causation should be reversed.

In support of the District Judge's finding, the record reveals that the pump was repaired and reassembled in appellees' yard under the supervision of Mr.

Woodman, the machinist foreman, whose qualifications as a machinist date back to 1917, and who had been employed as shop foreman at the same yard from 1937 to January, 1947, when his duties were changed to that of machinist foreman. He is the holder of a steam engineer's license, first assistant, ocean (Aps. 1475, 1460-61). Mr. Woodman stated that the practice followed in his shop in reassembling any machinery is to use the manufacturer's marks or to place identifying marks on machinery parts when disassembling the same where manufacturer's marks are absent, in order that the same may be replaced in their proper positions. He further testified that this practice was followed in the reassembling of the Clayton boiler pump on the "Urania" (Aps. 1474-76). Mr. Biehler stated that there are numbers on the pump heads of the Clayton boiler pump and that any competent mechanic could put it together properly (Aps. 855).

The survey report of Mr. Gallagher of the American Bureau discloses that in connection with his survey of the "Urania" prior to her departure the annual boiler survey was made in which all parts of the Clayton boiler were found after careful examination to be in good operating order (Libelants' Exhibit No. 17, Aps. 1661). He verified these facts in his deposition testimony (Aps. 1639). It will also be remembered that Mr. Williams approved and accepted all work on the vessel (Aps. 595-96).

Not only did the Clayton boiler have the benefit of the careful inspection of Messrs. Williams and Gallagher, but on October 15, 1948, the very day on which

the "Urania" sailed from appellees' yard, James D. Clarke, still another marine surveyor representing appellant, surveyed the boiler and, while finding a leaking condition caused by unsuitable packing or washers in the plungers of the pump, approved the pump after the condition was rectified. Specifically, Mr. Clarke testified that the defect was remedied by the installation of a different type of packing and that upon renewal of the packing, the leaking was cured and the pump restored to "good operating condition" (Aps. 756-59). Mr. Lillehei, one of appellees' superintendents, also witnessed the operation of the pump in the presence of Mr. Clarke (Aps. 1525). It is indeed surprising that appellant should seek to fasten liability for improper assembling of this unit on appellees when its own surveyor witnessed the assembled unit "to satisfy myself it was in good operating condition," hours before the sailing of the ship (Aps. 759). Moreover, Mr. Clarke's observation was not merely casual, since he viewed the equipment for "about 15 minutes." Apparently sensing the weakness of this phase of its case, appellant withheld injecting the issue into its pleadings until March 18, 1949, less than three weeks before trial (Aps. 59, 557-58). That the inclusion of the Clayton boiler in the cross-libel was an afterthought is borne out by the fact that Mr. Antippas personally discussed the repairs in November with Mr. Biehler (Aps. 859).

If improper assembling of the parts was the cause of the damage found, it is highly significant that the pump was partially dismantled when the manufacturer's service man came aboard the vessel (Aps.

837). That the manufacturer was suspicious of the treatment of this equipment by the ship's personnel is evidenced by its notation on its service order statement (Respondent's Exhibit A-15), quoted as follows:

> "*Operation* maintainance (*sic*) and repair procedures as outlined in manual should be followed closely." (Underscoring in original) (Aps. 1394)

This was an idle injunction to the chief engineer who, by his own admission, could read only "very little" English (Aps. 738). Evidently the trial and error of the perplexed engineer in assembling and disassembling the unit continued with bad effect for many more months, for the record shows that "further repairs" were necessary in March, 1949 (Aps. 557-58).

Telemotor

The provision in the original contract covering appellees' undertaking with respect to the telemotor reads:

> "26. Steering Engine and Controls.
>
> "Test out steering engine and steering gear and report condition found. Free up and libricate (*sic*) mechanical equipment found in good order. Remove locking device from rudder before testing." (Libelants' Exhibit No. 1, Aps. 186-87)

In spite of the plain meaning of this provision contemplating only the testing out of the system and the lubrication of those parts found in good mechanical condition, appellant at pages 32 and 36, respectively, of its brief, states appellees were by contract bound to "overhaul" and "repair" the telemotor. It is understandable that appellant should seek to enlarge the

contractual undertaking considering the meager factual support the record affords its claim on this item. Those facts disclose not only a complete and competent discharge of appellees' undertaking, but a strong suggestion that this part of the vessel's equipment was mishandled and damaged because of either an imperfect understanding of proper maintenance or disregard of the rules of good marine practice. The failure of the telemotor within a few hours after the vessel's departure is an additional illustration, of which the record affords many more, that the crew of the "Urania" was incapable of handling the ship through inexperience or incompetence or both.

There is little need to detail the steps taken by appellees to perform this part of the contract. Skilled machinists and electricians employed by appellees, after lubricating the system and making the necessary examinations and tests, proved the telemotor in good working order (Aps. 1469-74, 1547-54). The telemotor system functioned perfectly on the sea trial of the "Urania," no difficulty of any kind having been experienced in its operations, according to Mr. Gallagher, who was passing on the vessel for classification by the American Bureau of Shipping (Aps. 1642, 1659). Apparently Mr. Gallagher could not express the same satisfaction with the chief engineer, whom he requested be withdrawn from the throttle (Aps. 384). Mr. Williams also stated that during the sea trial the vessel "steered and obeyed the rudder" properly (Aps. 360). The system was functioning properly when the vessel sailed and no trouble was encountered until the vessel was "about six miles outside of Port

Angeles" (Aps. 656). Mr. Short, the electrician who effected repairs to the telemotor at Port Angeles, stated that the system was oscillating because certain working parts had gotten out of proper mechanical adjustment (Aps. 1542). He expressed the opinion that the system had been "tampered with" because the cover enclosing that part of the steering engine where he effected the adjustment, had been removed prior to his arrival on board (Aps. 1537). Mr. Clarke, surveyor sent by appellant's agent to Port Angeles to correct the telemotor, testified the vessel's chief engineer had advised him that he attempted to remedy the trouble before Mr. Clarke arrived, thus lending support to the opinion expressed by Mr. Short (Aps. 775). Appellant's theory that a broken wire caused the breakdown is untenable in view of Mr. Gallagher's report that the whole electrical system had been measured by megger and all circuits restored to good order (Aps. 1660), and Mr. Short's testimony that he had established there was continuity in the wiring and that the electrical system was intact before any other tests were made (Aps. 1530). In sum, proof is entirely lacking that the telemotor breakdown was caused by negligence on the part of appellees.

Burden of Proof

Appellant cites *Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co.*, 281 Fed. 97 (C.C.A. 2d, 1922) under the heading in its brief, "Failure of Telemotor Steering System," apparently to sustain the proposition that the burden of proof rests upon appellees to show that the damages were not proximately caused by some negligent act or omission by them (Ap-

pellant's Br. 34-37). The rule of the cited case applies neither to the claim for telemotor failure nor to the issues raised by main engine breakdowns and Clayton boiler, as urged by appellant. The *Pan-American* case does not apply because first, the defendant in that case had exclusive custody of the bailed article. Here appellant never relinquished control of the ship, or any part thereof.

The general rule in the law of bailment concerning burden of proof is that in an action by the bailor against a bailee for loss of or damage to the bailed property, after the bailor has proved the bailment and failure of the bailee to deliver the property upon demand, or proved redelivery of the property in a defective condition, the burden of going forward with the evidence is upon the bailee to show that the loss or damage was not due to his negligence. The burden of proof, of course, never shifts, but the burden of going forward with the evidence is upon the bailee by reason of a legal presumption operating in favor of the bailor in such circumstances. Here appellant wholly failed to sustain its burden of proof that the bailed article was redelivered in a defective condition, in consequence of which appellees had no presumption to meet. But even if appellant had sustained such burden, the general rule announced would not apply since the appellees did not have exclusive possession of the property. The rule is that when the bailor retains control over the property or when the property is in the mutual custody of bailor and bailee, the burden of proof rests on the bailor as in any case of alleged negligence. 8 C.J.S. 347, Bailments, Sec. 50,

6 Am. Jur. 461, Bailments, Sec. 381, *The DuPont*, 14, F. Supp. 193 (D.C. Md. 1936), *Moe v. American Ice & Cold Storage Co.*, 30 Wn.(2d) 51, 190 P.(2d) 755 (1948). Indeed, this rule is recognized by the court in the *Pan-American* case, where the court says at page 107:

> "It will be admitted that the rule which raises a presumption of negligence in the bailee, where goods are delivered in good condition, does not apply if the possession of the bailee has not been exclusive of the bailor."

Another feature which distinguishes the *Pan-American* case from the instant case is that the collision in the cited case occurred immediately upon the ship's being returned to the owners. Here the breakdowns of the main engine occurred after the vessel had traveled 2400 miles. Surely there is no rule of law which requires the repair yard to establish affirmatively the cause of such breakdowns. The difficulties of such proof would be insurmountable, especially where, as here, the owners did not notify the yard of the breakdowns until the ship had sailed for foreign waters, and the owners either refused or neglected to make available to the yard, the damaged ship and its component parts.

The correct rule to be applied in the instant case respecting burden of proof is concisely stated in a recent opinion of the United States Court of Appeals for the Sixth Circuit. In that case, the vessel was libeled after an accident in which a tug capsized while furnishing services to the vessel, which was stranded on a bar. The issues raised by the libel was whether

the owners of the ship, acting through the master and crew, were guilty of negligent acts proximately causing the capsizing of the tug. In discussing this issue, Judge Hamilton said in his opinion:

> "It is not enough for the libellant to prove that the negligence might perhaps have caused the injury. If the injury complained of might well have resulted from one of many causes, it is incumbent upon the libellant to produce evidence which will exclude the operation of those causes for which the Master or the crew is under no legal obligation. If the cause of the injury may be as reasonably attributed to an act for which the Master and crew are not liable as to one for which they are, the libellant has not sustained the burden of fastening tortious conduct upon the Master or crew. The evidence showing negligence must come from witnesses who speak as knowers, not as guessers." *America-B. F. Jones* (6 C.C.A.) 1945 A.M.C. 987, 991.

Damages

Concerning this issue, the sole item which would appear to warrant discussion is Cross-Libel Item No. 15 (See Appellant's Br. 38) which is denominated "Loss of profits during corrective repairs * * * $7000.00." Appellant's proof wholly failed as to this item since there is no evidence that the vessel would have been profitably engaged during the period of the repairs. There is complete lack of evidence of what "the charter market was for a vessel of this type during the period of the breakdown" (See remarks of District Judge quoted in Appellant's Br. 52). To support its contention that its proffered exhibit of charter party of the vessel in December, 1948, was ad-

missible, appellant cites *The Penelopi*, 148 F.(2d) 884 (C.C.A.2d, 1945). We do not believe that the holding of this case goes so far as to allow admission of evidence as to profits made by the vessel on a later voyage in distant waters. It must be kept in mind that the voyage on which the breakdowns occurred was the maiden voyage of the "Urania" for the appellant, and the product which was carried on the December charter party was "Benzene (Benzol)" (See exhibit attached to back cover of appellant's brief). There is no showing in the record that the "Urania" was equipped to carry this product when she left appellees' yard. We submit, in any event, that evidence of the December charter party was properly excluded for the reasons advanced by appellees' proctors (Appellant's Br. 50-52).

CONCLUSION

To summarize appellees' position on the main engine breakdowns:

(1) Appellees had no duty respecting work on the main engine other than to obey the orders and instructions of appellant under the supervision and control of its authorized agents;

(2) Even had appelless undertaken responsibility for this work, the work as accomplished was in all respects performed in a competent and workmanlike manner;

(3) Appellant has wholly failed in its attempt to relate the breakdowns to work performed at appellees' yard.

Respecting the Clayton boiler and telemotor, we submit:

(1) Appellant has not sustained its burden of proof that the failures of these units was due to any act or omission by appellees;

(2) The preponderance of evidence adduced concerning these items affirmatively shows that such failures were caused by the negligence of appellant's own servants.

The trial of this action consumed nine court days and included the testimony of 35 witnesses. Despite the length of the case and the technical nature of the evidence, the District Judge was not beset by any doubts in reaching his decision. His comprehensive and analytical opinion delivered at the close of argument contains a thoughtful evaluation of all the evidence.

He found no merit in any of the contentions advanced by appellant. In large measure the appellant acquiesced in the court's findings by abandoning on appeal many of the contentions it urged most vigorously below. We are confident that this Court, after it has considered the record and the briefs, will be as firmly convinced as was the District Judge that appellant has not sustained its burden on any of the issues, and will affirm the decree in all particulars.

Respectfully submitted,

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Proctors for Appellees.

No. 12322

In The United States Court of Appeals
For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment.
Appellant,

vs.

E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

MERRITT, SUMMERS & BUCEY,
LANE SUMMERS,
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840 Central Building,
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

Appellant will reply to the points discussed in appellees' brief in the same order in which these points were set out therein.

I.

Work Performed by Appellees' Emloyees on the Oil Cooler, Telemotor and Clayton Heating Boiler Was Done Under Contract and Not Merely on the Basis of Loaned Servants.

Appellees contend that their contractual undertaking was limited to lending personnel to work under appellant's supervision and control (Appellees' Br. 2).

An examination of Item No. 1 of the contract for extra work (Lbts. Ex. No. 4, Aps. 254) will disclose that, although the appellees undertook in the first sentence to furnish diesel engine machinists to "work in the engine room as directed by the chief engineer" (Aps. 255), other and subsequent work specified and set out under that item of the contract was to be performed by appellees themselves as their own undertaking. Much of this work was done ashore in appellees' shops and yard, such as installation of new liners in five cylinders, grinding, testing and repacking of various valves, and shop work in cleaning and testing the heat exchangers and coolers (Aps. 575-578).

Further proof that such work was done under the supervision and control of appellees is found in the testimony of Mr. Harper, appellees' chief accountant. He testified that time of shipyard employees working under the supervision of appellees' foremen, was charged to this work (Aps. 409), and appellees justified the charges for extra work by showing an item of $10,978.00 overhead on a total of $28,145.82 cost of labor, stores and material for the extra work performed, and claimed that such

overhead charge was not unreasonable or excessive in amount (Lbts. Ex. 12, Aps. 413, 434). Again, as to the engine repairs under Item No. 1 of the extra work contract, appellees show a total labor cost of $1156.28 and charged as overhead on this labor cost the sum of $739.21 (Aps. 415). The overhead included supervision, other than foremen's salaries, which were actually included in the labor charges (Aps. 432). Do appellees intend this court to believe that they were only loaning employees and workmen to do all the work on the engines under Item No. 1 of the extra work contract and still appellees were charging almost 60% of the labor cost as overhead?

In *The St. Louis* (CCA 2) 296 Fed. 855, 1924 A.M.C. 444, the Second Circuit Court recognized, in a case where repairs on a ship were undertaken by a shipyard, similar to the present case, that the shipyard could not avoid liability merely because the ship's officers and crew participated in repair work being performed on the vessel. The court said:

> "The contract for reconditioning the St. Louis and other vessels belonging to libelants was one of bailment (Pan American v. Robins [C.C.A.] 281 Fed. 97), and respondents, the bailees, were to do the work with their own servants, at their own yard. That contempora-

neously libelants were to do, and were doing, other work is immaterial."

The St. Louis, 296 Fed. 855, 857, 1924 A.M.C. 444.

Appellees maintain in their brief that the particular work performed by them on the lubricating oil cooler was examined by an assistant engineer of the "Urania" and by Mr. Gallagher, a surveyor, and that since neither of these persons objected to the manner in which the work on the coolers had been performed, no complaint by appellant can be considered at this time (Appellees' Br. 6). It should be remembered, however, that the work on the coolers was performed in appellees' shore shops, and the record indicates that neither the ship's engineer nor Mr. Gallagher was present in the shops during the cleaning and repair of the coolers. In fact, Mr. Gallagher, the surveyor, is shown only to have been present in the ship with the engineer for "I suppose five minutes or so, maybe 10 minutes" (Aps. 1447) *after* the first cooler had been tested by appellees' pipe shop foreman (Aps. 1449). In addition to the above, we have the following testimony given by the chief engineer of the "Urania":

"Q. Did you or anybody concerned with the ship do any work on this cooler?

A. No, nothing" (Aps. 716.)

"Q. I understand. My question is did you clean the water pipes leading into the cooler?

A. No. The unit and the cooler itself was taken care of by the shop." (Aps. 739.)

Appellees' pipe shop foreman testified in detail as to what work he and the shipyard employees performed on the coolers (Aps. 1438). He testified that the chief engineer of the "Urania" did not specify the type of cleaning fluid or solution that was used in cleaning the heat exchangers or coolers (Aps. 1454). Nowhere in the record does it appear that crew members or representatives of appellant participated in the work on the coolers, or were even present during such work, except for the few minutes that Mr. Gallagher and the assistant engineer are reported to have been present after at least part of the testing of the coolers had been completed.

Even if appellant's representatives had been present and had participated to some extent in such work, we submit that appellees cannot be relieved from their failure to properly perform their obligations as undertaken in the extra work contract. Thus, it has been held by the same court in which this case was tried that inspection of repair work on a ship by a chief engineer does not waive defects and negligent performance by a shipyard. In *The West Katan* (W. D. Wash.) 1929

A.M.C. 1559, the question was presented as to inspection of a defective piston head supplied by a shipyard for the main engine of a vessel. The court said:

> "Holes were drilled in the lower surface of the casting for the removal of the core or cores after the casting. The then Chief Engineer upon the respondent vessel, evidently before the holes were thereafter plugged, and while the piston was at the plant where it was being machined for libellant, upon his inspection, noticed the thinness of the lower side of the piston. The nature of the Chief Engineer's employment was not such, however, as to authorize him to waive for claimant such defect. Neither was the inspection of the piston head in its making by other agents of the owner of such a nature as to relieve libellant from its implied warranty."
>
> *The West Katan,* 1929 A.M.C. 1559, 1565.

The Second Circuit Court of Appeals has held to the same effect in *West Nohno* (CCA 2) 21 F. 2nd 304, 1927 A.M.C. 1581, 1584. The decision of the Second Circuit Court of Appeals in *The St. Louis, supra,* as previously quoted herein, also supports this rule, as does the decision of this court in *The Ecuador* (CCA 9) 1926 A.M.C. 342, 10 F. 2nd 769, and of the Second Circuit Court of Appeals in *Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co.* (CCA 2) 281 F. 97, cert. den. 259 U. S. 586,

66 L. Ed. 1076, as discussed in appellant's opening brief.

The doctrine of loaned servant, which appellees seek to apply in this case, is not applicable for the reason that appellees assume that their servants were loaned to appellant, whereas in fact appellees had control and supervision over the particular work out of which the claims in the cross libel arise.

Appellees cite *Atlantic Transport v. Coneys* (CCA 2) 82 Fed. 177 in support of thier position. The following statement from the opinion of the Circuit Court in that case will demonstrate the fallacy of attempting to apply the loaned servant doctrine to the present case.

> "* * * it is true that the officers of defendant corporation (the shipowner) had some general power to direct how alterations and repairs should be made, but they had no particular power 'to direct and control the manner of performing the very work in which the carelessness occurred,' and [that] the existence or nonexistence of such kind of power is the real question in the case."
>
> *Atlantic Transport v. Coneys* (CCA 2) 82 Fed. 177, 180.

The general rule on this doctrine of loaned servant is stated in American Jurisprudence, as follows:

> "If he (the master) does not surrender full full control over the servant, he remains liable

for his negligence during the time he acts for the person to whom he is loaned."

35 *Am. Juris., Master & Servant,* §541, p. 971.

In summary of this point, it seems clear from the record that although the chief engineer of the "Urania" may have supervised the work of appellees' machinists performed in the engine room of the vessel (Aps. 361), he did not supervise other work performed, such as cleaning and testing of the oil cooler and testing and repair of the Clayton heating boiler, which work appellees undertook to perform in their shore shops with their own employees and using their own supervisory personnel. For the negligent performance of such work appellees should be held liable to appellant in this case. Obviously, at some point the desired repair work on a vessel must be specified and requested by the representatives of the shipowner. Surely this in itself should not constitute action which would relieve appellees of their contractual obligation to properly perform the work.

II.

Appellant Proved by a Preponderance of the Evidence a Breach of Duty by Appellees and Their Employees in Performing the Work on the Oil Cooler of the Main Engine.

Appellees next contend that the test, including the 50-pound pressure applied to the cooler, was

adequate, relying on the opinions of several of their witnesses to substantiate the contention (Appellees' Br. 13). Yet the *fact* remains uncontradicted on the record that the operating manual of the engine manufacturer specified a test pressure of four times the amount used by appellees on the cooler (Respondent's Ex. A-16, Appellant's Br. 23). Appellees seek to dismiss this very important fact by merely stating that "it is abundantly clear from the testimony that none of this data is applicable in determining whether a proper test was used by Mr. Oakland" (Appellees' Br. 12).

We submit that the opinions of appellees' witnesses cannot and should not be substituted for the fact of the specific instructions of the engine manufacturer as to a proper test pressure on the cooler, nor can it be persuasively argued that such data in the operating manual was only placed therein to show extreme maximum pressures. The purpose of the manual was to serve as a guide in the operation, maintenance and repair of the engine and accessories. Certainly the manufacturer intended the data to be used as a guide in determining the extent of pressure to be applied in testing the unit for leakage, rather than merely to report the "breaking point" maximum pressures that had been applied to the unit during the course of manufacture.

III.

The Negligence of Appellees Was Proved by a Preponderance of the Evidence to be the Proximate Cause of the Breakdowns of the Vessel.

Appellees' brief, in discussing this point, entirely disregards the affirmative testimony of several witnesses who examined the "Urania" after breakdowns and arrival at Los Angeles and who uniformly stated the cause of the breakdowns to be galling of the helical timing gears due to poor lubrication attributable to leaks *actually found* in the oil cooler. Testimony of these witnesses has already been identified, with reference to the Apostles, in Appellant's Opening Brief (pp. 12-15) and will not be repeated herein.

Likewise, the testimony of the same qualified witnesses eliminated any other possible causes of the breakdowns, and the testimony of these expert witnesses is identified with Apostle references in Appellant's Opening Brief (pp. 15-17).

Appellees in their brief seek by reference to isolated questions and answers of these same witnesses to convince this court that such threads of testimony preponderate over the accumulation of other testimony to the contrary (Appellees' Br. 19-21). Certainly, an examination of the testimony of witnesses Dupuy, Pike, Summers, S. W. Newell, M. L. Newell and N. A. Cross, in its entirety will

convince this court that the witnesses did in fact eliminate other possible causes, including those causes advanced by appellees.

IV.

Clayton Heating Boiler

Appellees maintain in their brief that appellant's proof of malperformance and damage as to this unit is dependent upon "gossip" and "self-serving" statements (Appellees' Br. 35).

The gossip referred to by appellees is the sworn testimony of the service representative of the manufacturer of the heating boiler who personally went aboard the vessel at Los Angeles after breakdowns and removed the unit to the manufacturer's repair shop ashore for repairs, and later reinstalled the unit aboard the vessel, making necessary adjustments thereon (Aps. 823-825). Who could possibly be in a better position to state the nature of damage to the pumps on the boiler?

To be sure, the witness candidly stated that he did not make all the repairs himself, the work having been performed in the ordinary course of the manufacturer's business, and the findings of the persons actually performing the repairs having been incorporated into a routine report prepared by the witness (Aps. 828). We submit that the testimony and Respondent's Exhibit A-15 are com-

petent to show the nature, extent and cause of the damage.

In addition, the chief engineer described how he found broken parts or pieces in the pump of the boiler when it was dismantled after breakdown (Aps. 744). Appellees concede in their brief that the pump on the boiler was not functioning properly on "the very day that the 'Urania' sailed from appellees' yard," resulting in efforts being made on October 15 to further repair the unit (Appellees' Br. 37). Surveyor Clarke, who at the time of testifying in this case was employed by appellees' California affiliate, Commercial Ship Repair, Inc., (Aps. 769) admitted that the pump of the boiler was not disassembled for inspection when these further repairs were attempted on the date of departure from the appellees' yard (Aps. 758). He was only able to testify that no leaks were observed after replacement of certain packing in the pump and removal of emulsified oil.

V.

Telemotor Steering System

Appellees seek in their brief to absolve themselves of any liability for breakdown of the steering system by claiming that their contract obligation was limited to testing out and lubrication of parts (Appellees' Br. 38).

The record shows, however, that appellees' workmen actually hooked up the wiring in the steering system which was found to be partially disconnected (Aps. 1547). Certainly, such work was not gratuitously performed by appellees, and whether it is of a type coming within the classification of "testing out" as used in the contract, or the description of "repair" as used in Appellant's Brief, the record shows that it was performed by appellees without suggestion of any supervision or attempted control by appellant, and hence appellees should be liable for damages resulting from breakdown proved to have been due to improper connecting up or adjustment of the unit (Aps. 766, 1538). In fact, appellees' electrical foremen undertook to instruct the chief engineer of the "Urania" as to proper operation of the telemotor steering system, which would tend to negative any claim that work performed on this unit was under the control or supervision of appellant's employees (Aps. 1548).

CONCLUSION

The court below was of the opinion that appellant had failed to prove by a preponderance of the evidence that the various breakdowns and failures on the vessel were caused by malperformance or nonperformance of appellees' obligations. It is re-

spectfully submitted that these conclusions of the trial court are contrary to the evidence as discussed in appellant's brief.

We therefore submit that the decree of the court below should be reversed.

Respectfully submitted,

MERRITT, SUMMERS & BUCEY,

LANE SUMMERS,

CHARLES B. HOWARD,

Proctors for Appellant.

No. 12325

United States

Court of Appeals

For the Ninth Circuit.

SAMUEL D. COLLINS,

Appellant,

vs.

CLINTON T. DUFFY, Warden at San Quentin Prison, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED
1949
PAUL P. O'BRIEN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

Crim. No. 28983G

SAMUEL D. COLLINS,

Petitioner,

vs.

CLINTON T. DUFFY, Warden at San Quentin Prison, San Quentin, California,

Respondent and Defendant.

PETITION FOR WRIT OF CERTIORARI

Appeal from an order of the California State Supreme Court denying petition for Writ of Habeas Corpus.

Statement of Case

A petition for Writ of Habeas Corpus was presented to and denied without hearing by the State Court. Petition was numbered 4954 and the date of denial was March 16, 1949. The petitioner was convicted of two charges of abortion and one of murder of the 2d degree in the Superior Court of Los Angeles County, Hon. Clement D. Nye presiding, case no. 121566. Petitioner presents his case in pro per. This case has been appealed and affirmed. Petitioner feels aggrieved and is not satisfied with previous decisions, he is not satisfied that justice has been done in this case. Constitutional questions were not raised at the trial nor on the appeal. It now becomes the task of petitioner to

bring up these points of Civil Rights and liberties and Federal questions because of counsel's negligence on these points.

Petitioner contends that he was denied 'due process of law' thruout the trial in several instances. The mandate of the law as defined in the California Penal Code was not complied with. The mandate of the law as enumerated and defined in the California State Constitution was not complied with. The protection of our own State Constitution was denied the petitioner. Evidence was introduced in a manner that is contrary to the express provisions of the State Constitution as well as the Penal Code. Testimony of the alleged accomplices was accepted by the State Court as fact without the required corroboration demanded by the law.

Petitioner's conviction violated his Constitutional rights as expressed in the Fourth and Fifth Amendments to the United States Constitution. This conviction was also in violation of his Constitutional rights as expressed in the State Constitution, Art. 1 Sections 13 and 19. In the following pages these violations are listed and pointed out in sequence.

Opening Statement

Petitioner claims that the courts erred to the prejudice of the petitioner in receiving in evidence the testimony wherein is related a conversation allegedly heard over a dictograph. The prosecutor did not attempt to lay nor did the courts require a proper foundation for the introduction of this testimony. No recordings or transcriptions were made

though these records were vital in corroborating the claims of the police that a dictograph had actually been installed in the defendant's home. The conversation or testimony credited to the dictograph does not rise to the dignity of evidence but is mere supposition, speculation and guesswork. The trial court, to give it due credit, declined to permit the alleged voices to be named, but the prosecutor persisted, nevertheless, in naming or identifying these alleged voices, and, this improper identification was permitted to remain in the record. Officer Lynn Slaten had the gall to testify that he knew the petitioner very well and could identify his voice, when, as a matter of fact, he had only had a little conversation with him on two or three occasions.

None of the witnesses could say that he saw the persons named whose voices he claimed he heard. The recording instrument was not introduced into evidence nor was the receiver. It is the petitioner's contention that a fraud was perpetrated on the court, the jury and the petitioner. The fraud consists in the police claim that a dictograph was used to obtain evidence. Except for the mere word, uncorroborated, of the police, we have no physical evidence that a dictograph actually had been used in this case.

Section 653h, California Penal Code permits the use of a dictograph under certain prescribed conditions, i.e., that it must be installed by a regular, salaried police officer, expressly authorized thereto by the head of his office or by a District Attorney.

This provision of the law was not complied with.

If a dictograph had actually been installed it would be a violation of the Civil rights of the petitioner. It had the effect of compelling the defendant to be a witness against himself, an act expressly forbidden by the State Constitution, as well as the Fifth Amendment to the U. S. Constitution. The alleged installation of the dictograph required that forcible, stealthy entry be made into the petitioner's home; it deprived him of the right to be secure in his person, his house, papers and effects . . .

The Fourth Amendment says that this right shall not be violated . . . The California State Constitution also says the same thing . . . that this right shall not be violated. This alleged installation of a dictograph was made without a court order, search warrant or other judicial authority. The very existence in the code of Section 653h is a violation of the People's Civil liberties as expressed in the Fourteenth Amendment . . . 'no State shall make nor enforce a law which abridges the privileges or immunities of the citizens of the United States'. It is the right and privilege of the People to be secure in their homes against any unreasonable search and seizure or any other unlawful entry into their homes.

At the present time in the United States, the question of Civil Rights and liberties is a vital issue. These rights and liberties are being accorded to members of certain minority races, but the rights and liberties of the majority are being wilfully ignored in most States. Shall the State of Cali-

fornia be permitted to freely make and enforce laws which abridge the most elementary and fundamental rights of the People? Was the State created to serve the People or were the People created to serve the State and its elected or appointed officials? From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Going further along into the transcript we note that the police freely and cheerfully admit that they searched and seized the personal and private property of the defendant. The testimony of state's witnesses and Everett Davis, a member of the search and raiding party, proves this contention. See reporter's transcript, page 254, lines 6 and 7.

The search of petitioner's home was made to justify the arrest and the arrest was made to justify the search. The arrest was made without a warrant but this action does not justify a search of the petitioner's home. In Chambers v. Florida, 309 U. S. 227-228 as well as Malinski v. New York, 324 U. S. 401-402-417, the U. S. Court ruled . . . 'the due process of law clause of the 14th Amendment just as that in the 5th Amendment was intended to guarantee procedural standards adequate and appropriate to protect at all times the people charged with or suspected of crime by those holding power and authority".

In May of 1948, the District Court of Appeal at Los Angeles, in ruling on a case brought by A. L. Wirin against the Los Angeles police, held that the Fourth U. S. Constitutional Amendment and the

California Constitution, Article 1, Section 19, prohibited unlawful search and seizure by the police or other persons in authority. It set forth in part: . . . these acts of the police were contrary to the provisions of the Fourth U. S. C. A. and the California State Constitution.

Here, petitioner contends that he was denied his right to 'due process of law'. He was denied the protection of his own State Constitution as well as the protection of the Federal Constitution and its Amendments. He contends that the Penal Code Section 653h is unconstitutional in its entirety; that, one policeman can not legally give permission to another policeman to violate the Civil rights and liberties of a citizen. No policeman can legally authorize another gendarme to break into, or make forcible entry into a citizen's home, either to make a search and seizure of the citizen's home and property or to compel him in any way to be a witness against himself. The police may not justify an arrest by a search nor a search by an arrest unless upon authority of a search warrant issued by a judge or court which has jurisdiction. These acts of the police are therefor unlawful and petitioner is justified in his grievance.

The testimony of the witnesses indicates that they were coached and rehearsed in their testimony; the testimony of the principal witness clearly shows manufactured evidence. Witness Delyi admits that he went to the home of petitioner at the direction of the police in the case. He denies that the police

coached him and told him what to say. Why deny that part of it after arranging for entrapment and manufacture of evidence? Why would the police rely on the ingenuity of the witness when the police are admitted experts in the fine art of entrapment, manufacture of evidence and the coaching of witnesses?

All three counts were tried together, counts 1 and 2 were prejudicial to count 3; count 3 prejudiced the other 2 counts. The police created the fiction that their principal witness, Delyi, was not an accomplice. It is evident from the transcript that this witness was both a principal as well as accessory before and after the fact. As such, his testimony is subject to independent corroboration in order to make it credible and admissible into evidence. His testimony was not corroborated within the meaning and mandate of section 1111, Penal code. The testimony of the women had no independent corroboration, therefore, it behooved the police to create fictional corroboration by this dictograph hoax. All the testimony relating to the dictograph should have been stricken.

Inasmuch as the evidence was taken illegally, through search and seizure without a warrant or judicial authority, none of it was admissible. In 1914 the U. S. Supreme Court established this rule: If letters and private documents can thus be seized and used in evidence . . . the protection of the Fourth Amendment might as well be stricken from the Constitution.

In Agnello v. U. S., 269 U. S. 20, 33, the court said; 'belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause'.

In Gouled v. United States, the U. S. Court said. "It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in Boyd v. U. S. 116 U. S. 616; in Weeks v. U. S., 232 U. S. 383, and in Silverthorne Lumber Co. v. U. S., 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two, (4th and 5th) Amendments . . . that such rights are declared to be indispensible to the full enjoyment of personal liberty, personal security, and private property; that they are to be regarded as the very essence of Constitutional liberty; . . . it has been repeatedly decided that these Amendments should receive a liberal construction so as to prevent the stealthy encroachment upon or a gradual depreciation of the rights secure by them, by imperceptible practice of the courts or by well intentioned but mistakenly over zealous executive officers.

In Michael Di Re v. U.S., No. 61 October term, 1947, the U.S. Supreme Court again affirmed the principle that evidence illegally obtained is not

admissible into evidence. Again, in Anne Johnson vs. U.S., No. 329 October term, 1947, the same court ruled against the admissibility of evidence illegally obtained. In Albert Lee v. Mississippi, the U.S. Court ruled, upholding Lee's contention that his civil rights had been abridged by the use of illegal evidence.

In Boyd v. U.S., 6 S.Ct. 524; 116 U.S. 616; 29 L.Ed. 746, we find . . . "when the thing forbidden in the 5th Amendment to the U.S. Constitution, namely, compelling a man to be a witness against himself, is the subject of search and seizure of his private papers, it is an unreasonable search and seizure within the meaning of the Fourth Amendment. The use of the dictograph and the evidence obtained by unlawful search and seizure in the petitioner's case had the effect of compelling him to be a witness against himself within the meaning of the Fourth and Fifth Amendments to the U.S. Constitution.

In Wisneiski v. U.S. 47 F. (2d) 825; the U.S. Court said, 'Invalid search is not made valid by what it brings to light'.

In Michael Di Re v. U.S., supra, the U.S. Court said, 'In law a search is either good or bad to begin with and does not change character from its success'.

The search and seizure in the petitioner's case was bad to begin with and was not made legal by its alleged success. The use of the dictograph was bad in that it was intended to compel the petitioner to be a witness against himself, in violation of his

right to 'due process of law, his Constitutional guarantee of civil liberties' under both the State and Federal Constitutions.

The State Supreme Court was petitioned as follows:

By an information of the District attorney of and for the County of Los Angeles, petitioner was charged, in three counts, with two crimes of abortion and one of murder, 2d degree.

Petitioner pleaded not guilty to all three charges; the three counts were tried together before the Superior Court of the State of California, in and for the County of Los Angeles, the jury returning verdicts of guilty on the two abortion counts, and the third count, guilty of murder in the second degree.

Thereafter, petitioner moved for a new trial, which was denied on March 21, 1946. Petitioner then appealed to the District Court of Appeals, Second District, Division three, which Court affirmed the judgments and orders denying the motion for new trial. (People vs. Collins 80 C.A. (2d) 526; 182 p. 2d. 585).

A petition for rehearing was denied on July 8, 1947 and the Supreme Court of the State of California denied a petition for hearing on July 22, 1947.

Petitioner now seeks a Writ of Habeas Corpus.

FACTS

Inasmuch as the testimony at the trial was lengthy and the facts pertinent to this petition will be dis-

cussed in detail infra, there follows a brief general statement of the evidence as presented at the trial. The first witness for the prosecution, Mrs. Crystal Louise Hawkins, testified that on July 3, 1945, while accompanied by Mrs. Helen Thompson, she went to the combination home and Office of Dr. S. D. Collins, your petitioner; that she told petitioner she was pregnant, but did not want the child; that he thereupon performed certain acts with instruments upon her private parts; that several days later she passed a partly formed fetus; that about a month later she visited the petitioner, at which time she had a certain conversation with him regarding Mrs. Helen Thompson.

The second witness for the prosecution was Mrs. Helen Thompson who testified she visited petitioner on June 29, 1945, in the same condition as Mrs. Hawkins and in general related a similar story.

The main prosecution witness regarding count three was John Michael Delyi. He testified that he and Margie F. Wilson, though not married, were living together as husband and wife; that in July of 1945, she became quite ill; that he took her to the petitioner's office-residence, where she was treated by petitioner; that several days later she seemed worse, so he took her again to see petitioner who looked at her and gave him some pills for her to take; that she several days later became progressively worse and died.

Officer Lynn Slaten of the Los Angeles Police Department testified that on August 4, 1945 he and other police officers were listening over an instru-

ment to a conversation allegedly taking place in petitioner's office-residence; that; over this instrument he heard a man's and woman's voice; that the microphones were in petitioner's office downstairs and in an upstairs sleeping room, although he did not install said microphones; that the hearing or receiving part of this instrument was in a house directly behind petitioner's; that the conversation was taken down by a shorthand reporter; which conversation Officer Slaten then proceeded to testify to.

Officer Slaten further testified that later the same day he picked up the petitioner in front of the Receiving hospital, by taking the keys out of petitioner's car and telling him to come along; that after taking Mrs. Hawkins, who had been with the petitioner, into the hospital, Officer Slaten took petitioner to his office-residence and there waited for the Deputy District Attorney, Ferguson, Captain Thad Brown, investigators Davis and Corsini, Detrich and Pinker of the Police department and Miss Adams, a short hand reporter.

They all entered petitioner's office-residence and proceeded to the treatment room where photographs were taken. Mr. Davis gathered up instruments. as well as bottles of medicine and other medical appliances; that he; Slaten removed a card index file of the petitioner's.

Following Officer Slaten as witnesses were Paul C. Miller, custodian of medical records at the Los Angeles County General Hospital, who testified to the hospital records of Mrs. Hawkins and Mrs.

Thompson; Dr. George Nador, who had examined Mrs. Hawkins and concluded an abortion had been performed on her; Dr. Wilber S. Hill, who had examined Mrs. Thompson, who testified that he diagnosed her case as an incomplete abortion, and Officer Everett P. Davis, who testified that he took several catheters from the petitioner's office-residence while he and the other officers were there.

Lorna Adams, law stenographer of the District Attorney, testified that she took in shorthand a conversation purportedly heard *the* the earphones of a dictograph, and she read the complete transcript she had taken down. This was the same conversation testified to by Officer Slaten, allegedly between petitioner and Mrs. Hawkins.

Final witnesses for the prosecution were Thad Brown, Deputy Chief of Police, whose testimony will be quoted at length, infra, and Dr. Frank R. Webb, the latter who performed an autopsy on Margie Wilson and testified that she died of acute peritonitis, there also being indications of pregnancy; he was then given most of the instruments and medicines taken from the petitioner's office-residence and identified them and explained how each was used.

The petition should be granted for the following reasons:

1. A Writ of Habeas Corpus can properly be issued under the facts herein.

2. The evidence regarding the conversations allegedly heard over the dictograph was not admissible, because it violates the constitutional rights of the petitioner.

3. The corroboration was insufficient because Crystal Hawkins, Helen Thompson and John Delvi were accomplices and their testimony can not corroborate each other.

4. The medical instruments, medical appliances and the medicines should not have been allowed in evidence because the defendant was himself compelled to produce them.

It is petitioner's position that there are grave issues of civil rights concerned in this proceeding regarding the alleged crime, which said issues of civil rights have not been ruled upon to date.

1. A Writ of Habeas Corpus can properly be issued under the facts herein.

The recent case of In Re Wallace, 4 C. (2d) 933 (1944), discusses Habeus Corpus and states at page 938:

> "A violation of the defendant's constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a Habeas Corpus proceeding if the petitioner has no other adequate remedy to test the constitutionality of the proceeding resulting in his conviction. (Citation of authorities)"

Petitioner has exhausted his rights of appeal, as

shown supra, and here seeks a Writ of Habeas Corpus upon the ground that his constitutional rights were violated at the trial which led to his conviction.

2. The evidence regarding the conversation purportedly heard over the dictograph was not admissible, because it violates constitutional rights of petitioner.

Lynn Slaten, police officer of the Los Angeles Police Force, was permitted to testify (commencing R.T. 171/7) as to certain conversations he allegedly heard on the 4th day of August, 1945. On voir dire examination, it was established that Officer Slaten was not present in the room where said conversations took place, but that he heard same over an instrument. There was absolutely no foundation laid for this evidence.

The voir dire examinaton of Officer Slaten brought out these further facts:

That the alleged conversations were heard by Slaten at 519 South Hoover Street, (a building admittedly right then in the process of being demolished and moved) (and which it was not shown whether or not there was electricity to operate a dictograph). No showing was even made as to the existence of this building at that address or that it had ever, in fact existed. At that address is a vacant lot, which is said to be directly behind petitioner's office-residence; that there was a recording device for recording conversations heard over this instrument; that no records were made, however; that the

alleged conversations were taken down in shorthand by Lorna Adams, a shorthand reporter from the District Attorney's office; that Officer Lynn Slaten made no personal notes of the conversations; that Mr. Slaten did not install the equipment either in the premises in which he was supposedly listening; that he did not witness the installation of said equipment in the residence of the petitioner.

Counsel for petitioner, at the conclusion of the voir dire examination (R.T. 180/14-181/9) made a lengthy objection to the introduction in evidence of any conversation allegedly heard over this dictograph on the ground, among others, that there was no evidence as to what manner and under what circumstances the dictograph was installed, or the kind and character of the equipment that was used. This objection was over-ruled.

Thereafter, Officer Slaten was allowed to testify as to the complete conversations he allegedly overheard over the dictograph, the microphones of which dictograph were allegedly in two rooms of the office-residence of the petitioner. He testified from the transcript made by the shorthand reporter Lorna Adams, who it was had taken down parts of said alleged conversations.

Basically the same story that was related by Officer Slaten was related by Lorna Adams, the shorthand reporter, when she testified later on in the trial (R.T. 268-16—277-20). Counsel for petitioner, at the conclusion of Miss Adams testimony, made a motion to strike same, which motion was denied by the court.

Article 1, Section 19 of the State Constitution of California reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized".

This section of the California Constitution is identical with the Fourth Amendment to the Constiution of the United States, and sets forth a fundamental principle that the founders of this country and this State deemed necessary for the protection of its citizens.

Article 1, section 13 of the Constitution of the State of California reads as follows:

> ". . . No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; . . ."

This section is identical with the Fifth Amendment to the Constitution of the United States.

The rights guaranteed individuals by the above two articles of the California Constitution and the Amendments to the Constitution of the United States are the backbone of Civil rights as handed

down to us from the English law. Mr. Justice Bradley, in his famous opinion in the case of Boyd v. the United States, 116 U.S. 616, (6 Supreme Court 524), wherein he discussed at length the decision by Lord Camden in the case of Entick v. Carrington, 19 Howell, St.Tr., 1029, points out that the basis of the Fourth Amendment to the Constitution was really founded upon the issuing of writs of assistance to the revenue officers in the colonies by the government of England. Justice Bradley goes on to state that these writs of assistance to revenue officers empowered them, in their discretion, to search suspected places for smuggled goods, which writs were pronounced by James Otis to be the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book, since they placed the liberty of every man in the hands of every petty officer. It was undoubtedly these writs of assistance that were in the minds of the men who achieved our independence and who established the Constitution of the United States.

It is apparent from the articles and the amendments quoted above that the right of a person to be secure in his home is a cherished right that has been recognized since the founding of our country.

Have we surrendered these rights to our civil servants, the police and other executive officers, or have these civil servants arbitrarily deprived us of these cherished rights? That is the question before this court today. Human liberty is in danger when

citizens must go into court to prove that the Bill of Rights liberties are theirs to practice.

Wire tapping, the use of dictographs, illegal search and seizure; these practices, gentlemen, are the way of life in a police state.

The supremacy of the law commands that the process of governmental administration, executive, administrative and judicial be dominated by the law and not by man's arbitrary caprice.

Petitioner contends that it was not the sort of trial guaranteed to him by the Bill of Rights. The personal safety of each and every one of us depends upon the preservation of the inviolability of due legal process uninfluenced by any sort of pressure, official or unofficial.

It is more important to preserve the integrity of the administration of criminal justice than that any particular defendant should be acquitted or convicted.

With this thought in mind, let us examine the use of the dictograph or dictaphone. Strangely enough, there are relatively few cases in California discussing the admissibility of evidence of conversations heard by the use of such equipment. Two cases in which the evidence is held admissible are People v. Schultz, 18 Cal. App. (2d) 485, and People v. Pustau, 39 Cal. App. (2d) 407.

The Pustau case was cited in the petitioner's case in the District Court of Appeals. In neither of these cases is there any discussion from a Constitutional standpoint, of the admissibility of evidence received

the use of a dictaphone, both cases seemingly assuming that there is no civil rights problem concerned therein. The Schultz case, at page 488, commencing at line 16, dismisses the problem in the following language:

> "There are other ways of identifying voices than by seeing the party who is talking, and a person is not obliged to hear and catch all of the conversation in order to relate the part of it which he does hear and catch".

There was no citation of authority for this statement.

Seemingly, the only other recent California case discussing the use of a dictaphone or a dictograph is the Pustau case, which, after quoting the above statement from the Schultz case, goes on to state at page 414, commencing at line 15, as follows:

> "Further, appellant readily admitted his presence at the conference in question, as did the other two participants therein, and the shorthand reporter testified he was familiar with the voice of appellant. Manifestly, no prejudice occurred to appellant by reason of the trial court's ruling in this regard"

It seems rather strange that the appellate courts of the State of California could pass over so lightly fundamental rights protected by both the State and Federal Constitutions. By that we do not mean to imply that other states of the United States and

even the Supreme Court of the United States have not ruled similarly. However, petitioner makes this point, that even admitting for the moment that evidence received over a dictograph may, in some cases, be admissible, the subject should be thoroughly discussed by the courts and in said discussions should set up affirmatively what steps should be taken before the evidence becomes admissible.

Probably the leading case in the Supreme Court of the United States concerning this type of evidence, that is, evidence obtained by mechanical means such as over wires or with amplifying devices, is the case of Goldman v. United States, 316 U.S. 129, 86 Law Ed. 1322 (1940). In this case, federal agents in the process of entrapping the defendants for conspiracy to violate the Bankruptcy Act, without a search warrant planted a dictograph in the office of one of the defendants. However, when the time came to listen to the conversation of the defendants in that office, the dictograph would not function. The Government officers had with them another listening device known as a detectaphone, a device having a receiver so delicate that when placed against a wall, it will pick up the sound waves originating in another room, and by means of an amplification system, enable the one with the device to hear what is going on in the other room.

The Court held that the use of the detectaphone and the information gained by its use was not made illegal by the trespass or unlawful entry in install-

ing the dictaphone. The court went on to hold that the use of the detectaphone by the government agents was not a violation of the Fourth Amendment, relying on the case of Olmstead v. the United States, 277 U.S. 438, 72 Law Ed. 944, the case which ruled in a 5 to 4 decision in 1927 that evidence received by wire tapping was admissible.

The Goldman case was a 5 to 3 decision with two dissenting opinions. Mr. Justice Murphy in his dissenting opinion stated in part as follows:

> "There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely, the spirit motivating the framers of the Amendment would have abhorred these devices no less. Physical entry may be wholly immaterial. Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the government, and intimate, personal matters are laid bare to view.
>
> Such invasions of privacy, unless they are

> authorized by a warrant issued in a manner and form prescribed by the Amendment or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment and equally call for remedial action."

Petitioner takes the position of Mr. Justice Murphy in this regard and earnestly puts forth the latter's argument. (Petitioner believes that since 1927 the use of such devices has been outlawed.)

If such devices as the detectaphone and the dictograph are to be allowed, it would seem that at the very least the officers using such devices should first obtain warrants issued by a Court which has first weighed the evidence as to the probability of a crime being committed, as in the case of search and seizure and search warrants. Is that too much to ask of the law?

The rights to be secure in home and office are, probably, the most important of all rights possessed by the individual. It seems that if these rights are going to be abridged in any manner, that there should at least be safeguards, such as first presenting the facts before a judge or tribunal of some kind and obtaining a warrant, before the intimate, personal matters of individuals are made open season to police officers.

It is realized that although the Fourth Amendment of the Constitution of the United States and similarly Article 1, Section 19 of the Constitution

of the State of California prohibit unreasonable searches and seizures, that the California courts, contrary to the practice of the Federal courts, adhere to the rule that even though evidence is obtained through an illegal search and seizure it is nonetheless admissible in evidence. (People v. Gonzales, 20 Cal. (2d) 165). It would seem to follow then that even if the acts of the officers in planting a microphone or dictograph, are unlawful and a trespass, the evidence so obtained would still be admissible. Although there are strong arguments against such being the rule, it seems that California is definitely committed to so holding.

However, even admitting that, it should not follow that police officers can take the witness stand and testify that they heard an alleged conversation, without any foundation first being laid showing who installed the equipment, when it was installed, and under whose authority. Such a showing was not made in the petitioner's case. Therefore, petitioner feels justified in his claim that a fraud was perpetrated by the police. The possibility of perjured testimony is readily apparent where the above foundation is not set forth. How can the law so destroy the basic constitutional rights of individuals without first requiring such a showing?

A direct connection between lawless administration of justice and the incidence of crime was reported by Robert Daru recently. Mr. Daru is co-counsel of the New York County Criminal Courts Committee on unlawful searches and seiz-

ures of the Bar Association. Reporting on a cross-country trip, Mr. Daru declared States with rigid codes for police investigations produced lower crime rates than States where "any evidence, no matter how obtained, is admissible in court." Sixteen States follow Federal procedures which bar evidence illegally obtained. Mr. Daru further reports,

"The sixteen States are doing better generally in handling the crime problem."

"A community that tolerates a lawless administration of justice is encouraging a form of lawlessness than can only lead to more lawlessness."

Not wanting to be trite but desiring to impress this court with the dangers of accepting merely the word of police officers that a dictaphone was installed and used, we have only to look to the farcical trials in the Hitler Germany State of yesterday and in Russia today.

It was probably with this in mind that Justice Thomas P. White in the recent case of Ware vs. Dunn, (1947) 80 C.A. (2d) 936, a search and seizure case involving the Constitutional issues here involved, stated:

> "From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Today, as in ages past, we are not without tragic proof that the exacted power of some governments to ignore the inalienable right of the individual and to resort to lawless enforcement of the law is the hand maid of tyranny.

> No higher duty, nor solemn responsibility, rests upon the courts than to maintain the constitutional and statutory shields planned and inscribed to preserve the liberty under law and protect each individual from oppression and wrong, from whatever source it may emanate." (Emphasis added.)

Even assuming that the use of such devices is Constitutional, which petitioner claims to the contrary, and even assuming that the use of such devices illegally would not prevent the evidence so obtained from being used in a court of law, there was no real evidence at the trial that showed a dictograph had actually been installed, other than the testimony of members of the police force, who were not the ones who actually installed the equipment, nor any evidence of any attempt at following the statute which gives the police officers authority in California to install such devices.

Section 653-h of the Penal Code of the State of California reads as follows:

> "Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; provided, that nothing herein shall prevent the use and installation of dicto-

graphs by a regular, salaried peace officer expressly authorized thereto by the head of his office or department or by a District Attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals."

It is petitioner's position that this section is unconstitutional and in violation of Article 1, Section 19 of the State Constitution and also the Fourth Amendment to the Federal Constitution, in that it authorizes police officers to install dictographs merely upon the authorization of a department head in the police department or of a District Attorney. If anything is to remain of the Fourth Amendment of the United States Constitution and of Article 1, Section 19 of the State Constitution, it would seem that at the very minimum it would be necessary, before installing a dictograph, that a warrant of some kind should first be obtained from a judge or court. When the statutory law gets to the state of all owing one police officer to give another police officer the authority to break into a man's home or his place of business and install dictographs or dictaphones, the rights of the individual are at an end, and the Fourth Amendment of the Federal Constitution and of Article 1, section 19 of the California State Constitution are merely illusory verbiage.

In the very recent case of McDonald v. The United States, October term 1948 of the U. S. Supreme Court, reported in Law edition Advance Opinions, Vol. 93, No. 4 at page 144, a case involv-

ing illegal search and seizure, the majority opinion had this to say at page 147:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Except in some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade the privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.
>
> Power is a heady thing; and history shows that the police acting on their own can not be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.
>
> We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate that the exigencies of the situation made that course imperative." (Emphasis added.)

Under that opinion it would seem that Section 653-h of the Penal Code of the State of California is unconstitutional in that it does not impose the magistrate between the police officer and the private individual.

However, even assuming the section unconstitutional, and of course assuming, as will be shown infra, that the trespass upon the premises of petitioner was unauthorized, it would still be the rule that evidence illegally obtained is admissible in California. However, let us examine the facts of the present case regarding the evidence allegedly heard on the dictograph. The record clearly shows that no attempt was made, when this evidence was offered, that is, the evidence regarding the dictograph, to conform to the above section of the California Penal Code.

The persons who installed the dictograph were not present in court, and gave no testimony regarding the installation. In fact, there was practically no evidence at all introduced by anyone as to how the installation was made, where it was made, and when it was made.

In addition, there were no dictograph records presented at the trial nor were there any records actually made of the alleged conversations that were introduced into evidence. There was no testimony by the head of a police office or department, or by a District Attorney, stating that it had authorized that said dictograph be installed in the office-residence of the petitioner.

Is it not strange that although Officer Slaten testified that one or two test records were started when the apparatus was first installed, which was a period of several days before the actual conversation testified to in court, that even these trial

records were not produced in court to show that there actually had been an installation of this dictograph or dictaphone equipment? Officer Slaten testified that the reason dictaphone records were not made of the conversations was that the machine was not functioning properly and the records could not be cut satisfactorily.

With 3 to 4 days to get this mechanism working, does it not seem odd that the Police Department did not see to it that the equipment was repaired and records made rather than relying on a shorthand reporter? How far this testimony is from the positive mandate of the Constitution of the State of California and of the Constitution of the United States of America.

Petitioner earnestly contends that the basic foundation for the reception of this evidence was never in fact laid and that the evidence should never have been admitted.

3. The Corroboration Was Insufficient Because Crystal Hawkins, Helen Thompson and John Delyi Were Accomplices and Their Testimony Cannot Corroborate Each Other.

Section 1111 of the Penal Code of the State of California regarding the testimony of an accomplice reads as follows:

> "A conviction cannot be had upon the testimony of an accomplice unless it shall be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not

sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Section 1108 of the same Code reads as follows:

"Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of 18 years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

Section 274 of the same Code reads as follows:

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than two nor more than five years."

The recent case of People v. Wilson (1944) 25 Cal. (2d) 341, was concerned with the same problem

in general as is presented in this petition. The Wilson case sets out the principle, on page 346 of said opinion commencing at line 26. That where one plays an active part in the transaction, there an abortion, he is subject to prosecution for the offense with which the defendant was charged, and is an accomplice within the definition of Section 1111 of the Penal Code. There the court said that the fact that Mr. Anderson, the husband of the woman upon whom the abortion was performed, had paid the fee for the abortion and had had a conversation with the defendant in which he assured her that the money was ready, and where he inquired how long he would have to wait, and where he stated that he knew the purpose of his wife's appointment with the defendant, that by these acts he had played an active part in the transaction and was therefore an accomplice within Section 1111 of the Penal Code.

Using the rule of the Wilson case and applying it to the facts of the testimony of the witnesses at the trial of the petitioner, it is clear that Crystal Louise Hawkins, Helen Thompson and John Michael Delyi were all accomplices under the definition of Section 1111 of the Penal Code and all subject to prosecution for violation of Section 274 of the Penal Code.

The testimony of Crystal Louise Hawkins, the first witness called by the prosecution, says she was living with Helen Thompson prior to going to the office-residence of the petitioner. Helen Thomp-

son being another complaining witness for the prosecution. (R.T. 3/4) Mrs. Hawkins further testified that she had an appointment with the petitioner (R.T. 4/10). She further testified that she had never been to see him before and that she had not known of the petitioner until a few days prior thereto. She stated that she had talked to someone regarding the petitioner, and that someone had made the appointment. It is apparent from the testimony of Mrs. Hawkins that she is referring to Mrs. Thompson, who later accompanied her on her first visit to the petitioner. She further testified that she then went to the office-residence of petitioner with Mrs. Thompson (R.T. 5/21) and that Mrs. Thompson introduced her to the petitioner (R.T.6/24). The evidence further shows that after certain acts alleged to have been done by the petitioner at this time, that Mrs. Hawkins met Mrs. Thompson and they left the office-residence of the petitioner together.

That, further, on returning to petitioner's office-residence, she told petitioner that Helen Thompson was in the hospital, meaning Mrs. Helen Thompson (R.T. 39/9).

The second witness for the prosecution, Helen Thompson, testified that she lived with Crystal Louise Hawkins (R.T. 60/7): that she visited the petitioner on the 29th day of June, 1945, and again on July 3, 1945 (R.T. 60/17-21); that after testifying about certain acts performed by the petitioner, that several days later at her home in the presence

of Mrs. Hawkins she passed a fetus (R.T. 77/23-25): that on July 3rd she accompanied Mrs. Hawkins to the office-residence of petitioner (R.T. 79/12); that during the time she was in the hospital she was in the same ward as Mrs. Hawkins. (R.T. 101-21).

In the light of the above facts, it is apparent from the rule of the Wilson case that both Mrs. Hawkins and Mrs. Thompson were accomplices of the defendant of the crime or crimes he is alleged to have committed. Certainly they each played an active part in the transaction involving the other with the defendant, such an active part as would make them accomplices within the definition of Section 1111 of the Penal Code, from which it would follow that other corroboration would be necessary in order to convict the petitioner. Petitioner believes that on the evidence properly admissible in this case, there was not sufficient corroboration.

With the evidence as to the dictaphone conversation ruled out, as we believe it properly should have been, and with the photographs of defendant's office-residence, together with the instruments and medicines seized there ruled out, which we shall show infra also to be inadmissible, that there was not sufficient corroboration to convict the petitioner of the alleged crimes.

The third witness for the prosecution, John Delvi, testified that he had lived together with the decedent, Margie F. Wilson, five or six weeks prior to her death on July 27th, 1945 (R.T. 115/4-11): that

he first met petitioner on the 24th day of July, 1945 (R.T. 116-9); that the occasion for going to the petitioner's residence was that Margie was very ill (R.T. 116/24-117-3); that he took Margie Wilson to the petitioner's residence; that he rang the door bell and when a lady came to the door asked for the petitioner and that the petitioner came to the door, (R.T. 117); that he told petitioner that Margie was very ill and that he, Delyi, then went back to his car and drove in the driveway at the right side of the house (R.T. 118/5-8); that he assisted the petitioner in helping Margie into the office of the petitioner, by practically carrying Margie in. (R.T. 118/15-20); that he waited for 20 or 25 minutes (R.T. 119-15); that Margie had been very sick since July 22, 1945 (R.T. 121/6); that on the 25th day of July he again took Margie back to the office-residence of petitioner (R.T. 123/16-24); that he went up and talked to petitioner and told him that she was very sick and that he would have to do something about it and that petitioner went into his office and gave him some pills which he put into an envelope (R.T. 124/6-9); that he, Delyi, gave Margie these pills (R.T. 129-10); that he had slept with Margie on the evening of July 22, 1945 (R.T. 136-19); that he also tried to give her some tomato juice (R.T. 130-15); that on July 26, 1945 had the following conversation with petitioner on the telephone:

> "I asked him to come out to the house because Margie was very ill. He said, what is the

address? I told him that the address was 2143 West View, that the house stood near Washington Blvd., and that the porch light would be lit on the house, and that he could not miss the house. At that moment the landlady interrupted me and said, Margie died, and I told Collins Margie died. He said, are you sure? I said yes, the landlady just told me, and I believe that he hesitated over the telephone for a moment, and then he asked the address again, and I again repeated the address, and I said, come out. I said, I will call the police. I have to have someone here. I can't take care of it myself. With that he said O.K., I will be out, and hung up." (R.T. 146-1-13)

It would seem that the above mentioned testimony of Delyi clearly would bring him within the rule enunciated in the Wilson Case. It would be hard to see how anyone could play a more active part in the transaction than did Delyi in regard to the alleged criminal act performed by petitioner upon Margie Wilson.

He was therefor an accomplice within the definition of Section 1111 of the Penal Code and his testimony required corroboration. It is readily apparent from the record that there is practically no corroboration to any of the testimony given by Delyi. To use what little corroborating evidence that there was presented in regard to Mrs. Hawkins and Mrs. Thompson would be highly prejudicial to the defendant.

There must be corroboration of Delyi's testimony and, it was entirely lacking. It is petitioner's position that this evidence of Mr. Delyi was not corroborated, as the testimony of an accomplice should be, and that there was absolutely no evidence supporting the third count of which petitioner was convicted, that of second degree murder.

In summary then, it is apparent that Crystal Louise Hawkins and Helen Thompson each actively participated in the abortion of the other and thus clearly brought themselves within Section 274 of the Penal Code. Under Penal Code Section 1111, their testimony required sufficient corroboration, for to use the statement of Mr. Justice Schauer in his dissenting opinion in the Wilson case:

> "The experience and wisdom of mankind, particularly of those dealing with judicial trials, accumulated through many generations, have brought the conclusion that 'evidence of an accomplice, coming from a tainted source, the witness being, first, an infamous man, from his own confession of guilt, and second, a man usually testifying in the hope of favor or expectation of immunity, was not entitled to the same consideration as the evidence of a clean man.' " (People v. Coffey (1911) 161 Cal. 433, 438 (119 P. 901), 39 L.R.A.N.S. 704.)

In complete accord with that statement the legislature of California has laid down the rule that a "conviction can not be had upon the testimony of an accomplice unless it is corroborated by such

other evidence as shall tend to connect the defendant with the commission of the offense; and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. (Penal Code Sec. 1111)

Clearly, too, the testimony of Delyi made him an accomplice, and as such his testimony under Section 1111 of the Penal Code required corroboration.

Suffice it to say here that it is obvious from the record that there is not sufficient corroboration of Delyi's testimony, in fact, there is none whatsoever on any of the major details regarding the alleged crime to have been committed on Margie Wilson. The testimony of a man who has lived with a woman, not being married to her, probably caused her to become pregnant, and to have gone through the situation that he alleges he went through in regard to her, certainly should have been looked upon with caution and suspicion. He could hardly have played a more active part in the transaction than if he had tried to do so.

4. The Medical Instruments, Medical Appliances and the Medicines Should Not Have Been Allowed in Evidence Because the Defendant Was Himself Compelled to Produce Them.

Although we have seen that the rule in California admits evidence that has been obtained through an illegal search and seizure, there is a well recognized distinction regarding the actual obtaining of the evidence. This distinction is brought out in the case of People v. LeDoux (1909) 155 Cal. 535, at page 548 the Court stated as follows:

"The Court, upon the mere question of admitting or rejecting evidence, will not take cognizance of the mode of its production, unless it be shown that the defendant has been compelled himself to give or produce it. (Emphasis added.)

The record in the present case shows that the petitioner was picked up at the receiving hospital in Los Angeles, and when picked up at said hospital, the keys of his car were taken by Officer Slaten; that he was then driven to his office-residence and there waited until the Deputy Chief of Police Brown, the District Attorney and several other police officers arrived; that the officers thereupon unlocked the door and took petitioner into his office-residence, took him all through the house, took photographs, seized instruments and medicines, and other medical equipment, and while there, elicited from him a statement, which however was not admitted into evidence. All this without a search warrant and not while actually making an arrest.

It is apparent from the transcript which reads as follows: (R.T. 288/12-17 and 289/1-2);

Testimony of Thad Brown, Deputy Chief of Police of the Los Angeles Police Department:

"Q. Do you recollect how you got into the house?

"A. Yes, when we arrived at the house on Commonwealth Ave., Slaten and Detrich and the Doctor were seated in a car in front of the house. Ferguson and myself and the stenog-

> rapher, I believe—no, she was already there I am sorry. Ferguson and myself walked up to the door; the entire party did. Slaten said to Dr. Collins, Sam give me your key. Dr. Collins reached into his pocket and pulled out a door key, and Slaten unlocked the front door and we all went inside."

that the petitioner was himself compelled to produce all the evidence obtained by the police officers in this search of his house. He was taken at the Receiving Hospital on Georgia Street, he was brought by the police officers to his office-residence, he was there requested to give up the key to his house, which he did, and thereupon the police let themselves in. It is submitted that under the ruling of the LeDoux case cited above, that all of the evidence so obtained was not admissible. This includes all the photographs introduced in evidence of the premises of the petitioner, and all of the medical instruments and other medical appliances identified by various witnesses, including Dr. Frank R. Webb for the prosecution, most of which instruments were not identified as having been used in the alleged offenses charged.

CONCLUSION

Petitioner respectfully submits that this is a proper proceeding and that a Writ of Habeas Corpus should issue for the reason that his Constitutional rights were violated at the trial leading to his conviction.

The rights set out in the Fourth Amendment of

the United States Constitution and Article 1, Section 19, of the State Constitution are for the protection of the guilty as well as the innocent, for who can properly segregate the guilty from the innocent when our fundamental Constitutional rights are violated?

To encourage police officers and District Attorneys to flaunt the Constitutional requisites is to court eventual disaster. The Courts must preserve our Constitutional rights, not to shield the guilty, but to protect the innocent.

As Mr. Justice Murphy states in his dissent in Goldman v. United States, cited supra:

> "The circumstance that petitioners were obviously guilty of gross fraud is immaterial. The Amendment provides no exception in its guarantee of protection. Its great purpose was to protect the citizens against oppressive tactics. Its benefits are illusory indeed if they are denied to persons who have been convicted with evidence gathered by the very means which the Amendment forbids. Cf. Weeks v. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341, LRA 1915 B. 834 Ann Cas 1915 C 1177. Its protecting arm extends to all alike, worthy and unworthy, without distinction. Rights intended to protect all must be extended to all, lest they so fall into desuetude in the court of denying them to the worst of men as to afford no aid to the best of men in time of need.
>
> "The benefits that accrue from this and other articles of the Bill of Rights are characteristic

of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the State. We cherish and uphold them as necessary checks on the authority of Government. They provide a standard of official conduct which the Courts must enforce.

"At a time when the Nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live."

/s/ SAMUEL D. COLLINS,
Petitioner.

Wherefore, the petitioner respectfully prays the Honorable Court to grant him relief from what he contends to be unfair and unjust judgments and grant him the relief that he seeks, A Writ of Certiorari to the State Supreme Court.

/s/ SAMUEL D. COLLINS,
Petitioner.

State of California,
Marin County,
San Quentin, California—ss.

Samuel D. Collins, being first duly sworn, deposes and says: that he is the petitioner in the above entitled action; that the facts in the above

entitled action are within his personal knowledge; that he has read the allegations in support of the foregoing petition and knows the contents thereof, and the same are true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

/s/ SAMUEL D. COLLINS,
Petitioner.

Subscribed and sworn to before me this 14th day of June, 1949.

[Seal] /s/ JOHN DOUGLAS SHORT,
Notary Public in and for said County.
My Commission Expires September 3, 1950.

[Endorsed]: Filed June 29, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28983-G

SAMUEL D. COLLINS,

Petitioner,

vs.

CLINTON T. DUFFY, Warden at San Quentin Prison, California,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The claims presented by the petitioner in this petition for a writ of habeas corpus were considered

and ruled upon by the California District Court of Appeal, on petitioner's appeal from the judgments of conviction entered by the Superior Court, People v. Collins, 80 Cal. App. 2d 526, 182 P. 2d 585. A petition for rehearing in that court was denied, as was a petition for a hearing by the California Supreme Court. Petitioner alleges that he unsuccessfully sought a writ of habeas corpus upon the grounds here asserted from the California Supreme Court. It does not appear that petitioner has sought review by the United States Supreme Court. Hence he has not exhausted his remedies under State law. (Ex parte Hawk, 321 U.S. 114.) For this reason and because no good reason is shown for interposition by a United States District Court, the petition is denied and the proceeding is dismissed.

Dated: July 7, 1949.

/s/ LOUIS GOODMAN,
U.S. District Judge.

[Endorsed]: Filed July 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Petitioner in the above entitled action hereby gives notice that he is appealing from an order of

the United States District Court, Judge Goodman presiding, denying his petition for Writ of Habeas Corpus.

Dated July 13, 1949.

/s/ SAMUEL D. COLLINS,
Petitioner.

[Endorsed]: Filed July 15, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, to-wit:

Petition for Writ of Habeas Corpus, Order Denying Petition for Writ of Habeas Corpus, Notice of Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of August, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12325. United States Court of Appeals for the Ninth Circuit. Samuel D. Collins, Appellant, vs. Clinton T. Duffy, Warden of San Quentin Prison, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 11, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 11329

United States
Court of Appeals
For the Ninth Circuit.

GETCHELL MINE, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the District Court of the United States for the District of Nevada.

FILED
OCT 28 1949
PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 11329

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

THATCHER, WOODBURN & FORMAN,

206 N. Virginia St.,
Reno, Nevada,

Attorneys for Plaintiff.

MILES N. PIKE,

United States Attorney,
District of Nevada,

Attorney for Defendant.

In the District Court of the United States for the District of Nevada

No. 613

GETCHELL MINE, INC., a corporation
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes Now the plaintiff, and for cause of action against the defendant alleges as follows:

I.

This action is brought against the defendant by virtue of the provisions of section 41 (20) of Title 28, United States Code, and arises under the Internal Revenue laws of the United States and particularly section 3475(a) of the Internal Revenue Code. The amount involved is more than the sum of Three Thousand Dollars ($3,000.) and less than the sum of Ten Thousand Dollars ($10,000.)

II.

That Getchell Mine, Inc. is a corporation incorporated under and by virtue of the laws of the State of Nevada and engaged in the business of operating a mining property known as the "Getchell Mine" situate in the Potosi Mining District, Humboldt County, Nevada. In the course of

its mining operations, plaintiff mines tungsten and gold ores and transports the same to its mill for treatment.

III.

That on or about the 1st day of January, 1937, plaintiff entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, whereby Dodge Construction, Inc. agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc. was paid sums ranging from 25c to $1. per cubic yard, depending on the distance said ores were transported which varied from 300 feet to 7 miles. That all of said transportation took place on the property of the plaintiff, and on roads built and maintained by the plaintiff. That at no time, in the performance of the oral contract with plaintiff and in the transportation of ores from the mine to stockpiles or to the mill, was Dodge Construction, Inc. acting in the capacity of a common carrier or a contract carrier for hire.

IV.

That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction, Inc. transported under such contract divers quantities of tungsten and gold ores under

the terms of the contract and received payment therefor from plaintiff in the sum of $160,787.31.

V.

That the Commissioner of Internal Revenue, as a result of a review of the circumstances surrounding the transportation of said ores, determined a tax due on the payments made to Dodge Construction, Inc. by plaintiff at the rate of three per cent (3%) of such payments and in an amount of $5,003.62, as shown by a letter from the Commissioner to the plaintiff, dated November 4, 1944, a copy of which letter is attached hereto as Exhibit A.

VI.

That the said amount of $5,003.62 was thereafter assessed, together with interest amounting to $1,105.11, which amount with interest was paid by plaintiff under protest and duress on March 2, 1946.

VII.

That on or about July 1, 1946, the plaintiff filed a claim for refund of said transportation tax, a copy of which claim is attached hereto as Exhibit B. That said claim was denied by the Commissioner of Internal Revenue on October 2, 1946, by letter, a copy of which is attached hereto as Exhibit C.

VIII.

That by reason of the action of the Commissioner of Internal Revenue, transportation taxes, under the provisions of section 3475(a) of the Internal

Revenue Code, have been illegally and erroneously collected and refund thereof has been illegally and erroneously denied to plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of $6,108.73, together with interest thereon from the date of payment, the same being the amount of taxes illegally collected by the defendant from the plaintiff.

THATCHER, WOODBURN
and FORMAN,
/s/ JOHN P. THATCHER.

EXHIBIT A

Treasury Department
Washington 25

Office of Commissioner of Internal Revenue
Address Reply to Commissioner of Internal Revenue
and Refer to MT:M:GB

Nov 4 1944

Reported by Dodge Construction, Inc., North Main Street, Fallon, Nevada.
Getchel Mines, Incorporated
Red House, Nevada

Sir:

A report has been received from the above-named carrier that you have declined to pay tax imposed by section 3475 of the Internal Revenue Code, as added by section 620 of the Revenue Act of 1942, on the transportation of property as follows:

Date Charges Paid	Amount Paid	Rate of Tax	Amount of Tax Due
December 1, 1942 to April 30, 1944, inclusive	$166,787.31	3%	$5003.62

(See Statement Attached)

Unless within fifteen days from the date of this letter a statement is filed with this office showing cause why this tax should not be assessed against you, the amount shown to be due will be entered on the current Miscellaneous Tax List of the collector of internal revenue for the district shown below. You should await notice and demand from the collector. Payment should not be forwarded to this office.

Respectfully,
/s/ D. S. BLISS,
Deputy Commissioner.

Collector of Internal Revenue, Reno, Nevada.

Statement

Months	Charges	Tax Due
1942 December	$7188.75	$215.66
1943 January	6998.67	209.96
February	5396.22	161.89
March	7848.60	235.46
April	7831.49	234.94
May	9133.54	274.01
June	11053.77	331.61
July	14507.37	435.22
August	13711.75	411.35
September	17659.60	529.79
October	11057.73	331.73
November	14408.87	432.27
December	12853.25	385.60
1944 January	7377.90	221.34
February	6938.40	208.15
March	5836.80	175.10
April	6984.60	209.54
Total	$166787.31	$5003.62

EXHIBIT B

Form 843
Treasury Department
Internal Revenue Service
(Revised April 1940)

Claim

To Be Filed With The Collector Where Assessment Was Made Or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side

Collector's Stamp

( ) Refund of Tax Illegally Collected
( ) Refund of Amount Paid For Stamps Unused, or Used in Error or Excess
( ) Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Nevada
County of Washoe—ss:

Name of taxpayer of purchaser of stamps, Getchell Mine, Inc.

Business address, 206 North Virginia Street, Reno, Nevada.

Residence .....

.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpaper named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Nevada.

2. Period (if for income tax, make separate form for each taxable year) from December, 1942, to April 30, 1944.

3. Character of assessment or tax, Tax on transportation of property.

4. Amount of assessment, $6,108.73; dates of payment, March 2, 1946.

5. Date stamps were purchased from the Government .....

6. Amount to be refunded, $6,108.73.

7. Amount to be abated (not applicable to income or estate taxes) $.....

8. The time within which this claim may be legally filed expires, under Section ..... of the Revenue Act of 19 ...., on .....,19.....

The deponent verily believes that this claim should be allowed for the following reasons:

See Attached statement, made an integral part of this claim.

.....

(Attach letter-size sheets if space is not sufficient)

Signed GETCHELL MINE, INC.

Sworn to and subscribed before me this ..... day of ....., 19.....

....., ...

(Signature of officer administering oath) (Title)

GETCHELL MINE, INC.

Claim for Refund of Tax on Transportation of Property

The taxpayer contends that it is not subject to the tax on the transportation of property under Section 3475 of the Internal Revenue Code as amended, since the ore never left its property, and the Commissioner has already recognized transportation of mine products from mine to preparation plant as not subject to tax in his regulations under Reg. 113, Sec. 143.13 relative to transportation of coal. There is no reason for distinguishing coal from other mineral products, there being no such distinction in the law except that the rate of tax is based on tonnage rather than amount paid for transportation.

The amount of $6,108.73 paid, and for which refund is being filed, is determined as follows:

Tax assessed on transportation charges of Dodge Construction, Inc. for loading and hauling ore on property of Getchell Mine from pit to mill	
Sulphide ore—December 1942 to April 1944	
3% of $114,961.14	$3,448.83
Tungsten ore—April 1943 to December 1943	
3% of $51,826.17	1,554.79
Transportation tax	5,003.62
Interest to December 26, 1944	448.31
Penalty of 5%	272.60
Interest on $5,451.93 from December 26, 1944, to March 1, 1946	384.20
	$6,108.73

EXHIBIT C

Treasury Department
Washington 25

Office of Commissioner of Internal Revenue
Address Reply to Commissioner of Internal Revenue
and Refer to MT:M:GB

Oct. 2, 1946

Cl. A-21155
Getchell Mine, Inc.
206 North Virginia Street
Reno, Nevada

Gentlemen:

Reference is made to your claim for refund of $6,108.73 representing an assessment made by this office and payment made by you of tax of $5,003.62 and penalty and interest of $1,105.11 with respect to the transportation of property under section 3475 of the Internal Revenue Code. The period involved is from December 1, 1942 to April 30, 1944, inclusive, and the tax was assessed with respect to amounts paid by you to Dodge Construction Company, Fallon, Nevada, for the transportation of property.

Your claim is made on the basis that you are not subject to the tax since the ore transported by Dodge Construction Company never left your premises. You contend that the transportation of mine products from the mine to the "preparation plant" is not subject to tax under Regulations 113, section 143.13, relating to the transportation of coal.

In your opinion there is no reason for distinguishing coal from other mineral products except that the tax is based on tonnage rather than the amount paid for the transportation.

Section 3475(a) of the Internal Revenue Code imposes a tax upon transportation charges paid to a person engaged in the business of transporting property for hire by rail, motor vehicle, water or air from one point in the United States to another. Section 3475(c) provides that the tax shall be paid by the person paying the transportation charges and collected by the person receiving such charges. The term "from one point in the United States to another" as used in the statute includes interstate, intrastate and intracity or other local movements which embrace transportation of property for hire wholly within the limitations of the owner's premises or on his roads.

As was previously stated in a letter addressed to you by this office under date of December 9, 1944, concerning your contention that the transportation of the ore from the mine to the mill or "preparation plant" is not taxable under the act or the regulations, the provisions of section 143.13(b) of Regulations 113, as amended, apply only to the movement of unprepared coal from the mine to a preparation plant operated in connection with coal mining operations and are not applicable to the transportation of any other property.

Accordingly, the tax on the transportation involved in your claim was properly due and paid

and your claim for refund of $6,108.73 representing tax, penalty and interest is hereby rejected in full.

Very truly yours,

JOSEPH D. NUNAN, JR.

Commissioner

By /s/ D. S. BLISS

Deputy Commissioner

United States of America,
State of Nevada,
County of Washoe—ss:

Geo. Wingfield, being first duly sworn deposes and says: That he is an officer, to wit, the president of Getchell Mine, Inc., a corporation, the plaintiff in the above entitled matter; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to his own knowledge except as to those matters which are therein stated on information or belief and as to those matters he believes it to be true.

/s/ GEO. WINGFIELD.

Subscribed and sworn to before me this 28th day of February, 1947.

[Seal] /s/ ETHEL HANNA,

Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed March 1st, 1947.

[Title of District Court and Cause.]

ANSWER

The United States of America, by its attorney, Miles N. Pike, United States Attorney for the District of Nevada, answering the allegations in the bill of complaint, admits, denies, and otherwise makes answer thereto as follows:

First: Admits the allegations in Paragraph I.

Second: Admits the allegations in Paragraph II.

Third: Admits the allegations in Paragraph III, except those contained in the last sentence thereof. As to the allegations in this last sentence in lines 17 to 21, inclusive, on page 2 of the complaint, the defendant is without knowledge or information sufficient to form a belief as to the averments contained therein.

Fourth: Admits the allegations in Paragraph IV.

Fifth: Admits the allegations in Paragraph V.

Sixth: Admits the allegations in Paragraph VI, except those in the phrase reading "under protest and duress on March 2, 1946," appearing in lines 10 and 11 on page 3 of the complaint. Defendant avers that the sum of $5,003.62 and the sum of $1,105.11 were not paid under protest and duress and also avers that these sums were paid by plaintiff on March 4, 1946.

Seventh: Admits the allegations in Paragraph VII.

Eighth: Denies the allegations in Paragraph VIII.

Wherefore, defendant respectfully prays that the plaintiff take nothing in this suit; that its bill of complaint be dismissed; and that all costs expended herein be assessed against plaintiff.

/s/ MILES N. PIKE,
Attorney for the Defendant.

Service, by copy, of the foregoing Answer is hereby admitted this 5th day of May, 1947.

THATCHER, WOODBURN & FORMAN,
/s/ JOHN P. THATCHER,
Attorneys for Plaintiff.

[Endorsed]: Filed May 7, 1947.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Hereby Is Stipulated by the parties to the action entitled above, acting by and through their respective attorneys, that the following facts are true and shall be accepted by the Court as having been established by competent evidence:

1. This action is brought against the defendant by virtue of the provisions of Section 41 (20) of Title 28, United States Code, and arises under the Internal Revenue laws of the United States and particularly Section 3475(a) of the Internal Revenue Code. The amount involved is more than the sum of Three Thousand Dollars ($3,000.00) and

less than the sum of Ten Thousand Dollars ($10,000.00).

2. That Getchell Mine, Inc., is a corporation incorporated under and by virtue of the laws of the State of Nevada and engaged in the business of operating a mining property known as the "Getchell Mine," situated in the Potosi Mining District, Humboldt County, Nevada. In the course of its mining operations, plaintiff extracts and moves tungsten and gold ores from natural deposits in the earth to surface ground. The said ores must then be removed and transported to its mill for treatment. After January 1, 1937, and from December 1, 1942, to April 30, 1944, both inclusive, such ores were removed and transported as stated in Paragraph 3 following:

3. That on or about the 1st day of January, 1937, plaintiff entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, whereby Dodge Construction, Inc., agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc., was paid sums ranging from 25c to $1.00 per cubic yard, depending on the distance said ores were transported, which varied from 300 feet to 7 miles. That all of said transportation took place on private roads owned, built and maintained by plaintiff on properties acquired by plaintiff prior to 1937 and owned by plaintiff in fee simple, except

that during part of the hauling of ores from the Granite Creek Mine to the Getchell mill the said ores were transported over a road built and maintained by plaintiff, for a distance of approximately one mile across the E½ of the E½ of Section 22, Township 38 North, Range 24 East, M.D.M., which said section is owned by the United States of America. Attached hereto and by reference made a part hereof is a map showing plaintiff's property and the roads traversing said property on which said transportation occurred.

4. That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction, Inc., transported under such contract divers quantities of tungsten and gold ores under the terms of the contract and received payment therefor from plaintiff in the sum of $166,787.31 That in the performance of said contract and the transportation of said ores, Dodge Construction, Inc., was an independent contractor and was engaged in the business of transporting property for hire within the meaning of Section 3475, Title 26, United States Code, unless the facts stipulated in paragraph numbered 3 hereof establish that Dodge Construction, Inc., was not so engaged within the meaning of said Section.

5. That the Commissioner of Internal Revenue, as a result of a review of the circumstances surrounding the transportation of said ores, determined a tax due on the payments made to Dodge

Construction, Inc., by plaintiff at the rate of three per cent (3%) of such payments and in an amount of $5,003.62, as shown by a letter from the Commissioner to the plaintiff, dated November 4, 1944, a copy of which letter is attached hereto as Exhibit A.

6. That the said amount of $5,003.62 was thereafter duly and regularly assessed by the Commissioner of Internal Revenue, together with interest amounting to $1,105.11, which amount with interest was paid by plaintiff on March 4, 1946.

7. That on or about July 1, 1946, the plaintiff filed a claim for refund of said transportation tax, a copy of which claim is attached hereto as Exhibit B. That said claim was denied by the Commissioner of Internal Revenue on October 2, 1946, by letter, a copy of which is attached hereto as Exhibit C.

It Further Is Stipulated that this action shall be submitted to the Court for decision upon the foregoing stipulated facts, together with whatever written briefs and oral arguments of counsel may be ordered by the Court. In the event, at any time prior to the Court's decision, it shall appear necessary to the Court or counsel for either of the parties that additional facts be established or that the foregoing stipulated facts be clarified in any particular, this case shall be re-opened for the admission of any competent, relevant and material evidence which may be offered by either of the parties and for the admission of any supplemental stipulation of facts which may be agreed upon.

Dated: This 11th day of March, 1948.

/s/ MILES N. PIKE,
Attorney for Defendant.

THATCHER & WOODBURN,
By /s/ JOHN P. THATCHER,
Attorneys for Plaintiff.

[Endorsed]: Filed March 16, 1948.

(Exhibits A, B and C attached to Stipulation of Facts are the same as Exhibits A, B and C attached to the Complaint set out on pages 5 to 12 inclusive.)

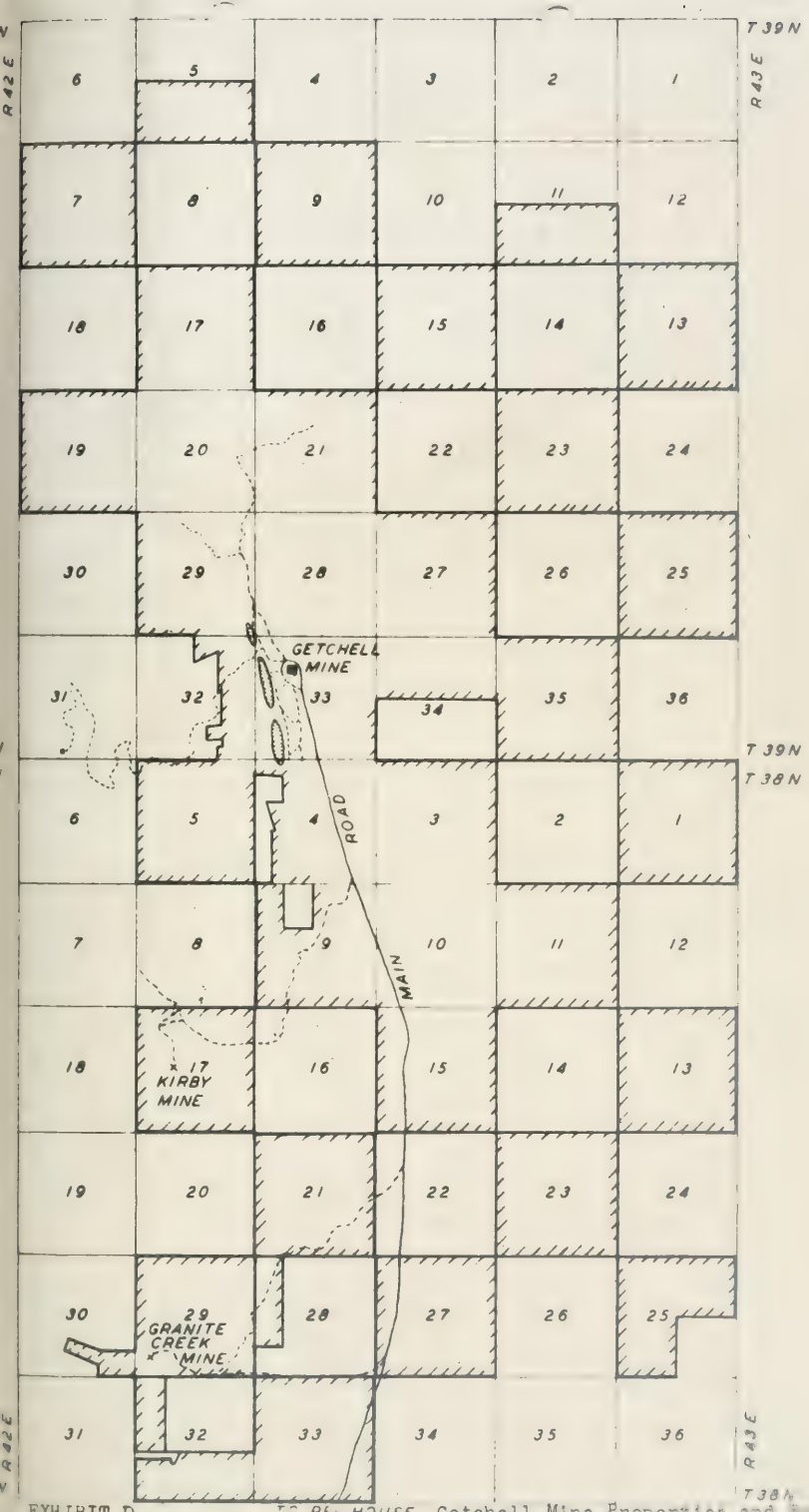


EXHIBIT D Getchell Mine Properties and Real

In the District Court of the United States of America, In and For the District of Nevada

Case No. 613

GETCHELL MINE, INC., a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The case was submitted on a Stipulation of Facts. Therefore, the Court makes its findings of fact in accordance therewith as follows:

Findings of Fact

1. This action is brought against the defendant by virtue of the provisions of Section 41 (20) of Title 28, United States Code, and arises under the Internal Revenue laws of the United States and particularly Section 3475(a) of the Internal Revenue Code. The amount involved is more than the sum of Three Thousand Dollars ($3,000.00) and less than the sum of Ten Thousand Dollars ($10,000.00).

2. That Getchell Mine, Inc., is a corporation incorporated under and by virtue of the laws of the State of Nevada and engaged in the business of operating a mining property known as the "Getchell Mine," situate in the Potosi Mining District, Humboldt County, Nevada. In the course of its mining operations, plaintiff extracts and moves

tungsten and gold ores from natural deposits in the earth to surface ground. The said ores must then be removed and transported to its mill for treatment. After January 1, 1937, and from December 1, 1942, to April 30, 1944, both inclusive, such ores were removed and transported as stated in Paragraph 3 following:

3. That on or about the 1st day of January, 1937, plaintiff entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, whereby Dodge Construction, Inc., agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc., was paid sums ranging from 25c to $1.00 per cubic yard, depending on the distance said ores were transported, which varied from 300 feet to 7 miles. That all of said transportation took place on private roads owned, built and maintained by plaintiff on properties acquired by plaintiff prior to 1937 and owned by plaintiff in fee simple, except that during part of the hauling of ores from the Granite Creek Mine to the Getchell mill the said ores were transported over a road built and maintained by plaintiff, for a distance of approximately one mile across the E-½ of the E-½ of Section 22, Township 38 North, Range 24 East, M.D.M., which said section is owned by the United States of America.

4. That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction, Inc., transported under such contract divers quantities of tungsten and gold ores under the terms of the contract and received payment therefor from plaintiff in the sum of $166,-787.31. That in the performance of said contract and the transportation of said ores, Dodge Construction, Inc., was an independent contractor and was engaged in the business of transporting property for hire within the meaning of Section 3475, Title 26, United States Code.

5. That the Commissioner of Internal Revenue, as a result of a review of the circumstances surrounding the transportation of said ores, determined a tax due on the payments made to Dodge Construction, Inc., by plaintiff at the rate of three per cent (3%) of such payment and in an amount of $5,003.62.

6. That the said amount of $5,003.62 was thereafter duly and regularly assessed by the Commissioner of Internal Revenue, together with interest amounting to $1,105.11, which amount with interest was paid by plaintiff on March 4, 1946.

7. That on or about July 1, 1946, the plaintiff filed a claim for refund of said transportation tax, a copy of which claim is attached hereto as Exhibit B. That said claim was denied by the Commissioner of Internal Revenue on October 2, 1946. The claim, said Exhibit B is as follows:

(Exhibit B is the same as Exhibit B attached to the Complaint, set out on pages 7 to 9, inclusive.)

One of the plaintiff's contentions is "that there was no taxable transportation because the movement of ores from mine to mill was a part and parcel of the plaintiff's mining operations and was not within the intendment of Congress in the enactment of the taxing statute." Defendant asserts that such contention relates to a ground that is new and different from those presented to the Commissioner of Internal Revenue in plaintiff's claim for refund.

The statement attached to and made a part of plaintiff's claim of refund recites that "* * * the Commissioner has already recognized transportation of mine products from mine to preparation plant as not subject to tax in his regulations * * * relative to transportation of coal. There is no reason for distinguishing coal from other mineral products * * *." The Commissioner was therefore advised by plaintiff's claim of refund of plaintiff's contention that the transportation described in Paragraph 3 of Stipulation of Facts was claimed to be a part of the plaintiff's mining operations. For what other purpose could have plaintiff in its statement mentioned the regulation relative to the transportation of coal? Plaintiff certainly did not ask the Commissioner to apply a regulation applicable to coal to the transportation here involved.

Section 3475 of Title 26, United States Code, does not exempt from its application transportation

incidental to production and the Court's attention has not been called to any administrative definition or interpretation exempting such transportation from the operation of the statute.

As stated in defendant's brief, p. 9, plaintiff's tax problem arose simply and solely because it paid a commercial "carrier" or "person engaged in the business of transporting property for hire" charges for trucking its ore. Plaintiff could have purchased its own trucks or it could have rented trucks owned by others and no tax would have attached to the movement of its property with such equipment.

From the foregoing facts the Court concludes:

Conclusions of Law

1. That there was transportation of property by Dodge Construction, Inc. within the meaning of Section 3475 of the Internal Revenue Code or the regulations thereunder, and that the tax herein involved was legally assessed and collected.

2. That defendant is entitled to judgment denying the prayer of plaintiff's Complaint and for costs herein incurred.

Let Judgment Be Entered Accordingly.

Dated: This 21st day of January, A.D., 1949.

/s/ ROGER T. FOLEY,
U. S. District Judge.

[Endorsed]: Filed January 24, 1949.

[Title of District Court and Cause.]

DOCKET ENTRY OF JUDGMENT ENTERED ON JANUARY 24, 1949.

1949

Jan. 24—"Entg. Judgment: Judgment: The Court concludes: That there was transportation of property by Dodge Construction, Inc. within the meaning of Section 3475 of the Internal Revenue Code or the regulations thereunder, and that the tax herein involved was legally assessed and collected. That defendant is entitled to judgment denying the prayer of plaintiff's complaint and for costs herein incurred."

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Getchell Mine, Inc., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 24, 1949.

Dated: July 22, 1949.

/s/ JOHN P. THATCHER,
THATCHER, WOODBURN & FORMAN,
Attorneys for Plaintiff.

Service, by copy, of the foregoing Notice of Appeals is hereby admitted this 22nd day of July, 1949.

/s/ MILES N. PIKE,
U. S. Attorney,
By /s/ BRUCE R. THOMPSON,
Asst. U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed July 29, 1949.

[Title of District Court and Cause.]

United States of America,
District of Nevada—ss.

COPY OF MINUTE ORDER OF JUNE 15, 1949.

This being the time heretofore fixed for hearing on plaintiff's Motion for New Trial and the same coming on regularly this day. John P. Thatcher, Esq., of the firm of Thatcher, Woodburn & Forman, appearing for and on behalf of the plaintiff, and Bruce R. Thompson, Esq., Assistant U. S. Attorney, appearing for and on behalf of the defendant. Following arguments by the counsel of the respective parties, It Is Stipulated and Ordered that the phrase reading "unless the facts stipulated in paragraph numbered 3 hereof establish that Dodge Construction, Inc., was not so engaged within the meantime of said Section." Commencing on line 29, and ending on line 31, page 2 of "Decision, Findings of Fact and Conclusions of Law" filed January

24, 1949, be deleted therefrom by interlineation and a period inserted after the word "Code" on line 29. Thereupon the Court makes the deletion. In all other respects, It Is Ordered that the plaintiff's Motion for a New Trial be, and the same hereby is, denied.

The above is a true copy from the record of an order made by said Court on the 15th day of June, 1949.

Witness my hand and the seal of said Court this 11th day of August, 1949.

AMOS P. DICKEY,
Clerk.

[Seal] By /s/ DAN MURPHY,
Deputy.

[Endorsed]: No. 12329. United States Court of Appeals for the Ninth Circuit. Getchell Mine, Inc., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed August 12, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12329

GETCHELL MINE, INC., a corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in finding that Dodge Construction, Inc. was engaged in the business of transporting property for hire within the meaning of section 3475, Title 26, United States Code, in the performance of its contract with Getchell Mine, Inc.

2. The court erred in not finding that the movement of gold and tungsten ores from the mine to the mill over private roads owned, built and maintained by Getchell Mine, Inc. on properties owned by Getchell Mine, Inc., with the exception of a haulage of one mile over land owned by the United States, was not transportation from one point in the United States to another.

3. The court erred in not finding that the operations of Dodge Construction, Inc., whereby it removed gold and tungsten ores from Getchell Mine,

Inc. properties and transported the same to stockpiles or to the Getchell mill for treatment, were a part of the mining operations carried on by Getchell Mine, Inc., and that such movement of property as took place was merely incidental to the mining operations carried on by Getchell Mine, Inc.

4. The court erred in concluding from its findings that there was transportation of property by Dodge Construction, Inc., within the meaning of section 3475 of the Internal Revenue Code and the Regulations thereunder.

5. The court erred in concluding from its findings that the tax levied and assessed under section 3475 of the Internal Revenue Code was legally assessed and collected.

The appellant designates the following parts of the record which it deems necessary for the consideration of the points above stated:

(1) The Complaint.

(2) The Answer.

(3) The Stipulation of Facts, with the map attached.

(4) The Decision, Findings of Fact and Conclusions of Law.

(5) The Minute Order amending the Findings of Fact, dated June 15, 1949.

(6) This Statement and Designation.

Dated: This 12th day of August, 1949.

/s/ JOHN P. THATCHER,
THATCHER, WOODBURN
& FORMAN,
Attorneys for Appellant.

Service, by copy, of the foregoing Statement of Points and Designation of Parts of Record Necessary for Consideration Thereof is hereby admitted this 12th day of August, 1949.

/s/ WM. J. KANE,
Asst. U. S. Attorney,
District of Nevada.
Attorney for Appellee.

[Endorsed]: Filed Aug. 13, 1949.

No. ~~11,329~~ 12329

IN THE

United States Court of Appeals

For the Ninth Circuit

GETCHELL MINE, INC. (a corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

WM. WOODBURN,
WM. J. FORMAN,
WM. K. WOODBURN,
JOHN P. THATCHER,
206 North Virginia Street, Reno, Nevada,
Attorneys for Appellant.

FILED
1949

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No. 11,329

IN THE

United States Court of Appeals

For the Ninth Circuit

GETCHELL MINE, INC. (a corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION OF DISTRICT COURT AND OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON APPEAL.

This action was commenced by Getchell Mine, Inc., a corporation incorporated under the laws of the State of Nevada, as plaintiff (hereinafter referred to as appellant), against the defendant the United States of America (hereinafter referred to as appellee), by the filing of a complaint on the 1st day of March, 1947, in the District Court of the United States for the District of Nevada (R. 2). The complaint alleges that the action was brought against the appellee by virtue of the provisions of section 41 (20) of Title 28, United States Code, and, further, that it arises under the

Internal Revenue Laws of the United States and particularly section 3475(a) of the Internal Revenue Code (R. 2), and that the amount involved is more than Three Thousand Dollars ($3,000) and less than Ten Thousand Dollars ($10,000) (R. 2); that Getchell Mine, Inc., is a corporation incorporated under the laws of the State of Nevada and is engaged in the business of operating a mining property known as the Getchell Mine in Humboldt County, Nevada, and that in the course of its mining operations appellant mines tungsten and gold ores and transports the same to its mill for treatment (R. 2). The complaint further alleges that on the 1st day of January, 1937, appellant entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, to remove by the use of power shovels gold and tungsten ores from the mining properties operated by appellant and transport the same by truck to designated stockpiles or to the appellant's mill for treatment; that Dodge Construction, Inc., was paid sums ranging from 25¢ to $1 per cubic yard, depending on the distance the ores were transported, which varied from 300 feet to 7 miles; that all of this transportation took place on the property of the appellant and on roads built and maintained by the appellant. It is further alleged that at no time during the performance of this oral contract was Dodge Construction, Inc. acting in the capacity of a common carrier or a contract carrier for hire (R. 3). It is also alleged that between the dates of December 1, 1942 (the effective date of section 3475(a) of the Internal Revenue Code) and up

to and including April 30, 1944, Dodge Construction, Inc. transported, under such contract, quantities of tungsten and gold ores and received payment from the appellant in the sum of $166,787.31 (R. 3); that thereafter the Commissioner of Internal Revenue determined that a tax was due on the payments made to Dodge Construction, Inc. by the appellant at the rate of 3%, amounting to the sum of $5,003.62, as shown by a letter from the Commissioner attached to the complaint and marked Exhibit A (R. 4-5); that the said amount of $5,003.62 was thereafter assessed, together with interest amounting to $1,105.11, which amount, with interest, was paid by appellant under protest and duress under date of March 2, 1946 (R. 4); that on or about July 1, 1946, appellant filed a claim for refund of said amount, a copy of said claim being attached to the complaint and marked Exhibit B (R. 4, R. 7); that this claim was denied by the Commissioner on October 2, 1946, by letter, a copy of the same being attached to the complaint and marked Exhibit C (R. 4, R. 10). In conclusion, the complaint alleges that the transportation taxes, under the provisions of section 3475(a) of the Internal Revenue Code have been illegally and erroneously collected, and that a refund thereof has been illegally and erroneously denied to appellant (R. 4), and that appellant demanded judgment against the appellee for the sum of $6,108.73, together with interest thereon from the date of payment (R. 5).

In answer to this complaint, the United States of America, the appellee herein, filed an answer on May

7, 1947 (R. 13) and admitted all of the allegations contained in the appellant's complaint save and except that it alleged that it was without knowledge or information sufficient to form a belief as to whether or not Dodge Construction, Inc. was acting in the capacity of a common carrier or a contract carrier for hire at the time of the performance of said oral contract, and further denied that the sum of $6,108.73 was paid under protest and duress on March 2, 1946, but does aver that this sum was paid by appellant on March 4, 1946, and denies that the said sum had been illegally and erroneously collected, and the appellee prayed that the appellant take nothing in this suit and that the complaint be dismissed and that costs expended be assessed against appellant (R. 14).

After a hearing on a stipulated statement of facts, judgment was entered on the 24th day of January, 1949, for the appellee and against the appellant (R. 21-25). Thereafter, a motion for a new trial was made by the appellant and said motion, on June 15, 1949, was denied (R. 28). On July 29, 1949, appellant filed a notice of appeal from the final judgment entered in this action on January 24, 1949 (R. 26-27).

The statutory provisions sustaining the jurisdiction of the District Court are contained in section 41 (20) of Title 28, United States Code, which provides, in substance, that the District Courts of the United States shall have jurisdiction to entertain a suit for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or col-

lected, if the claim does not exceed $10,000; and said action arose under the Internal Revenue Laws of the United States and particularly section 3475(a) of the Internal Revenue Code, which provides, in substance, for a 3% tax on the transportation of property from one point in the United States to another.

This Court has jurisdiction on appeal by virtue of Judicial Code, section 128, as amended, USCA Title 28, section 225, which provides, in substance, that the courts of appeals shall have jurisdiction to review by appeal final decisions of the district courts except in cases directly reviewable by the United States Supreme Court. The appeal is taken from a final judgment and is not one of the class of cases directly reviewable by the United States Supreme Court.

STATEMENT OF THE CASE.

This appeal is from a judgment of the District Court of the United States, in and for the District of Nevada, made and entered on the 24th day of January, 1949, in favor of appellee and against appellant (R. 26). The action was tried before the court without a jury, upon a stipulated statement of facts (R. 14-17), said statement being as follows:

> "1. This action is brought against the defendant by virtue of the provisions of Section 41 (20) of Title 28, United States Code, and arises under the Internal Revenue laws of the United States and particularly Section 3475(a) of the Internal Revenue Code. The amount involved is more than

the sum of Three Thousand Dollars ($3,000.00) and less than the sum of Ten Thousand Dollars ($10,000.00).

2. That Getchell Mine, Inc. is a corporation incorporated under and by virtue of the laws of the State of Nevada and engaged in the business of operating a mining property known as the 'Getchell Mine,' situated in the Potosi Mining District, Humboldt County, Nevada. In the course of its mining operations, plaintiff extracts and moves tungsten and gold ores from natural deposits in the earth to surface ground. The said ores must then be removed and transported to its mill for treatment. After January 1, 1937, and from December 1, 1942, to April 30, 1944, both inclusive, such ores were removed and transported as stated in Paragraph 3 following:

3. That on or about the 1st day of January, 1937, plaintiff entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, whereby Dodge Construction, Inc. agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc. was paid sums ranging from 25¢ to $1.00 per cubic yard, depending on the distance said ores were transported, which varied from 300 feet to 7 miles. That all of said transportation took place on private roads owned, built and maintained by plaintiff on properties acquired by plaintiff prior to 1937 and owned by plaintiff in fee simple, except that during part of the hauling of ores from the Granite

Creek Mine to the Getchell mill the said ores were transported over a road built and maintained by plaintiff, for a distance of approximately one mile across the E½ of the E½ of Section 22, Township 38 North, Range 24 East, M.D.M., which said section is owned by the United States of America. Attached hereto and by reference made a part hereof is a map showing plaintiff's property and the roads traversing said property on which said transportation occurred. (Exhibit D) (R. 19)

4. That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction Inc., transported under such contract divers quantities of tungsten and gold ores under the terms of the contract and received payment therefor from plaintiff in the sum of $166,787.31. That in the performance of said contract and the transportation of said ores, Dodge Construction, Inc. was an independent contractor and was engaged in the business of transporting property for hire within the meaning of Section 3475, Title 26, United States Code, unless the facts stipulated in paragraph numbered 3 hereof establish that Dodge Construction, Inc. was not so engaged within the meaning of said Section.

5. That the Commissioner of Internal Revenue, as a result of a review of the circumstances surrounding the transportation of said ores, determined a tax due on the payments made to Dodge Construction, Inc. by plaintiff at the rate of three per cent (3%) of such payments and in an amount of $5,003.62, as shown by a letter

from the Commissioner to the plaintiff, dated November 4, 1944, a copy of which letter is attached hereto as Exhibit A.

6. That the said amount of $5,003.62 was thereafter duly and regularly assessed by the Commissioner of Internal Revenue, together with interest amounting to $1,105.11, which amount with interest was paid by plaintiff on March 4, 1946.

7. That on or about July 1, 1946, the plaintiff filed a claim for refund of said transportation tax, a copy of which claim is attached hereto as Exhibit B. That said claim was denied by the Commissioner of Internal Revenue on October 2, 1946, by letter, a copy of which is attached hereto as Exhibit C."

The applicable statutes and regulations are section 3475(a) of the Internal Revenue Code, being 26 USCA, section 3475(a), which provides as follows:

"(a) Tax.—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express

company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation."

and Regulations 113, sections 143.1 and 143.11. Section 143.1 provides as follows:

"Meaning of terms.—As used in these regulations, unless otherwise specified or indicated by the context—

(a) General.—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(b) Person engaged in the business of transporting property for hire.—The term 'person engaged in the business of transporting property for hire' includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(c) Carrier.—The term 'carrier' is co-extensive with the term 'person engaged in the business of transporting property for hire'.

(d) Transportation.—The term 'transportation' as used herein means the movement of prop-

erty by a person engaged in the business of transporting property for hire, including interstate, intrastate, and intra-city or other local movements, as well as towing, ferrying, switching, etc. In general, it includes accessorial services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering livestock, and similar services and facilities.

(e) Property.—The term 'property' means any physical matter regardless of value over which the right of ownership or control may be exercised, including currency, documents, papers of all kind, etc.

(f) Coal.—The term 'coal' as used herein included anthracite, bituminous, semi-bituminous, sub-bituminous and lignite coal, coal dust, and coke and briquettes made from coal.

(g) Preparation plant.—The term 'preparation plant' means a plant operated in connection with mining operations at which coal is subjected to one or more processes, such as washing, crushing or sizing, intended to remove impurities or foreign matter or otherwise render the coal better suited for consumption, but not including a preparation plant operated as part of or in conjunction with any other establishment or place (such as a steel plant, coke oven, etc.) where coal is consumed as fuel or in the production of coke, briquettes, or other articles or materials.

(h) International Organization.—The term 'international organization', when used in relation to exemption from the tax, means any public international organization in which the United States participates pursuant to any treaty, or under authority of an Act of Congress authorizing such participation or making an appropriation therefor, and which has been designated by the President through an Executive order or orders as being entitled to enjoy the privileges, exemptions and immunities provided by the International Organizations Immunities Act, or part thereof including exemption from the tax, and the designation of which has not been revoked by the President, or the privileges, exemptions and immunities of which, or part thereof, including exemption from the tax, have not been withdrawn by the President by appropriate Executive order."

Section 143.11 provides as follows:

"Scope of tax.—Section 3475 (a) imposes a tax upon amounts paid within the United States after December 1, 1942, to a person engaged in the business of transporting property for hire, for transportation, originating on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another."

Section 143.13 provides:

"Application of Tax.—(a) In general.—The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. (See section 143.50.)

The tax applies to the total amount paid within the United States for transportation of property from one point in the United States to another even though while en route part of the transportation movement is through a foreign country.

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person, engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or similar person for transportation with respect to which a tax is payable to such person.

The tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

In the case of property transported from a point without the United States to a point within the United States the tax applies to any amount paid within the United States for that part of the transportation which takes place within the United States.

Where the amount paid in the United States covers the entire movement of property from point of origin in a foreign country to an inland point in the United States, the tax will apply to the pro rata part of such payment which represents transportation within the United States. However, in the case of shipments of foreign origin arriving by water, no tax will attach to

transportation or services performed prior to the unlading of property at the port of first arrival.

The tax does not apply: (1) to an amount paid outside the United States for the transportation of property from a point without the United States to a point within the United States; (2) to an amount paid by a carrier, freight forwarder, express company or similar person for the transportation of property with respect to which a tax is payable to such carrier, freight forwarder, express company or similar person; (3) to an amount paid for the transportation of property in course of exportation or shipment to a possession of the United States and actually so exported or shipped (see section 143.30). For governmental exemptions see Subpart D.

(b) Coal.—An amount paid after December 1, 1942, with respect to the first transportation for hire originating on or after that date of coal is subject to tax, except that an amount paid for the transportation of coal from the mine to a preparation plant as defined in section 143.1 (g) is not taxable, but the tax attaches to the first subsequent transportation for hire of the coal.

An amount paid for the transportation of coke or briquettes made from coal is not subject to tax, provided there has been a previous taxable transportation of the coal or coal dust from which such coke or briquettes were manufactured.

When a person delivers to a carrier a quantity of coal for a transportation movement, and the transportation tax has previously been paid with respect to the coal so delivered, a statement to that effect shall be endorsed on the bill of lading

or other shipping papers. This endorsement shall constitute authority to the carrier not to collect tax with respect to the transportation charges due on such shipment."

The question presented by the facts so stipulated and by the applicable statutes and regulations is: (a) whether or not the operations of Dodge Construction, Inc. on the Getchell Mine properties, under the terms of its oral contract with appellant constituted transportation of property within the meaning of section 3475(a); and (b) if they do constitute transportation of property whether or not such transportation within the confines of the appellant's properties is the transportation of property from one point in the United States to another.

SPECIFICATION OF ERRORS INTENDED TO BE URGED UPON APPEAL.

The following is a statement of the specifications of error upon which appellant intends to rely upon in this appeal:

1. The court erred in finding that Dodge Construction, Inc. was engaged in the business of transporting property for hire within the meaning of section 3475, Title 26, United States Code, in the performance of its contract with appellant.

2. The court erred in not finding that the movement of gold and tungsten ores from the mine to the mill over private roads owned, built and maintained

by appellant on properties owned by appellant, with the exception of a haulage of one mile over land owned by the United States, was not transportation from one point in the United States to another.

3. The court erred in not finding that the operations of Dodge Construction, Inc., whereby it removed gold and tungsten ores from appellant's properties and transported the same to stockpiles or to the Getchell mill for treatment, were a part of the mining operations carried on by appellant, and that such movement of property as took place was merely incidental to the mining operations carried on by appellant.

4. The court erred in concluding from its findings that there was transportation of property by Dodge Construction, Inc., within the meaning of section 3475 of the Internal Revenue Code and the Regulations thereunder.

5. The court erred in concluding from its findings that the tax levied and assessed under section 3475 of the Internal Revenue Code was legally assessed and collected.

ARGUMENT.

The argument herein made will refer directly to all five specifications hereinabove made. Inasmuch as the entire argument of appellant goes to all five assignments of error, the appellant will not specifically refer to each separate assignment as a specific point in that argument.

The question presented to the court is whether or not Dodge Construction, Inc. was engaged in the transportation of property within the meaning of section 3475(a) and that if it was engaged in such transportation whether or not such transportation, made within the confines of appellant's properties, was transportation of property from one point in the United States to another within the meaning of section 3475(a).

I.

The first question to be determined is whether or not the operations of Dodge Construction, Inc., under its oral contract with appellant, did or did not constitute the transportation of property. It is appellant's contention that this did not constitute transportation of property but was merely a part of and incidental to the mining operations carried on by appellant.

Under the terms of its contract with appellant, Dodge Construction, Inc. was required to remove tungsten and gold ores by the use of power shovels from the mining properties operated by appellant and transport the same by truck to designated stockpiles or to the mill of appellant for treatment. All of these operations by Dodge took place on the premises of appellant with the exception of a haul of approximately 1 mile over land owned by the United States. These operations by Dodge were essentially a part of the mining business carried on by appellant. This business was not merely the removal of tungsten and

gold ores from the earth but the milling and treatment of those ores. The removal from the earth and the transportation to the mill were a part and parcel of the production by appellant of a final product designed for sale. In the case of

In re Rollins Gold & Silver Mining Co. (District Court, Southern District New York) 102 Fed. 982

the court defines "mining" as follows:

> "This definition is certainly going very much further than the ordinary acceptation of the term, but even in this view the industries excepted are 'fishing, hunting, and mining, and mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature,' which would include the industry of milling and reducing ore. Mining and milling would seem to be, taken together, one industry, having for its object 'to obtain possession of material products in the state in which they were fashioned by nature.' Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step, to wit: the further separating of the materials found together, the one from the other, and extracting from the mass the particular natural product desired."

"Transportation" is defined by the Supreme Court of the United States in the case of

Gloucester Ferry Co. v. Commonwealth of Pennsylvania, 114 U.S. 196 at 199, 29 L. ed. 158 at 162

as follows:

> "Transportation implies the taking up of persons or property at some point and putting it down at another."

A situation analogous to that of the case at bar arose under section 3460 of the Internal Revenue Code providing for a 4½% tax upon amounts paid for transportation of oil by pipeline, the principal case being that of

Alexander v. Carter Oil Co., 53 Fed. (2d) 964, C.C.A. 10

which was an action by the Carter Oil Company against the Collector of Internal Revenue to recover taxes paid for the transportation of oil by pipeline. The oil company was engaged in the production and sale of oil but not in the business of refining. It owned certain producing leases on which the pipeline facilities were inadequate to carry the production from the field and it was accordingly necessary for the company to construct storage tanks to conserve the oil it was producing and in which to hold the oil until prices were better. It was not practicable to erect the tanks on the producing leases themselves so the company acquired title to certain land 4 miles from the closest and 12 miles from the farthest producing well on which it constructed the storage tanks and to which it piped the oil from the producing wells. A tax of 4½% of the transportation charge from the well to the storage tanks was assessed by the Collector of Internal Revenue. The sole question before the court was whether or not the movement from the wells to the storage tanks was a "transpor-

tation of oil by pipeline" within the meaning of section 3460. The court, in holding that the movement of the oil from the well to the storage tanks was local and incidental to the business of producing oil and that it was not transportation, said, at page 966:

> "There are four phases of the oil business: Production of crude oil; transportation; refining; and marketing of the refined product. Congress has singled out the phase of 'transportation' for taxation. Is the movement from the wells to storage tanks a part of production, or is it a part of transportation? It is possible for oil to go directly from the mouth of the well to the refinery; if so, transportation begins at the mouth of the well. Or, it may go to flow or settling tanks, and from thence to market. If so, transportation begins when it leaves the flow or settling tanks. More often it must go to storage tanks where it is held until it can be gauged and until pipe line facilities to the refinery are available, or until the market suits the producer. It is quite true that generally such storage tanks are small and on the lease, in which case we understand counsel to concede that the movement into storage is not and should not be taxed. Does it make a difference if the storage tanks are large or are not on the lease? These are circumstances to consider in determining whether the storage is, in good faith, a part of production, or whether it is an incident to transportation. If the appellee had constructed these large tanks a hundred miles from the leases, or near a refinery, clearly the movement to the tanks wold be a part of transportation to market. The question is primarily one of fact. Oil moves, through pipes in the

process of its production, a movement that is conceded not to be a taxable 'transportation'. Was the movement in this case really and in good faith a part of the business of production, or was it a part of the 'transportation' contemplated by Congress? The appellee's tanks were located as nearly as practicable to the leases; the cost of transportation to market was not decreased a penny by their location; the parties have stipulated that the 'function of the facilities" was to enable the oil to be stored in the vicinity of the leases; the trial court has held that the movement into storage was a part of the business of production, and not a part of its transportation to market. There is nothing in the record that enables us to hold that such a finding is without substantial support in the evidence."

It is equally true in the present case that the removal and movement of the raw tungsten and gold ores from the mining properties of appellant to the mill or to stockpiles, where the ores are stored until they can be treated, is a movement from one unit of the business of producing gold and tungsten to another unit of the same business and is a part of and incidental to the business of production of gold and tungsten concentrates and not a part of its transportation to market within the purview of section 3475(a).

To the same effect is the case of

Jones v. Continental Oil Co., 141 Fed. (2d) 923, C.C.A. 10

which was an action by the Continental Oil Company against the United States to recover a tax imposed

upon the transportation of crude oil by pipeline. The oil company was engaged in operating a number of producing oil leases in two fields. The oil was piped from the producing wells to stabilization plants where hydrocarbon gases were removed and saved, and from the stabilization plants to storage tanks. It was this movement of the oil from the well mouth to the stabilization plant which was contended by the United States to be a taxable transportation under the provisions of section 3460 of the Internal Revenue Code. In holding that the movement from the well to the stabilization plant was not transportation such as to be taxable under the Code but was incidental to the production of oil, the court said, at page 925:

> "The test to be applied in the determination of the taxability is not in dispute. The tax is '* * * imposed upon all transportation of crude petroleum * * * by pipe-line.' Treasury Regulations 42, Article 26, defines 'all transportation by pipeline' as including transportation by a private owner whenever the movement is substantially similar to movements which pipe-line carriers usually undertake and perform, if such movement is not merely local or incidental to the business of producing or refining oil. That if the movement is from wells to flow or storage tanks situated in the immediate vicinity, the movement is not such as a pipe-line carrier would normally render, and consequently is not subject to the tax, but the movement by pipe-line from the lease storage tanks to storage tanks usually maintained at receiving stations on the end of a 'stem' or gathering line, is subject to the tax."

It is interesting to note that as a result of these two decisions Congress in 1942 adopted an amendment to section 3460 of the Internal Revenue Code, being section 3460(c), by which it expressly exempted intra-industry movements by pipeline from the transportation tax imposed by the section.

In the case of

Louisiana & Pacific Railway Co. v. United States, 209 Fed. 244, Affirmed 234 U.S. 1 (Commerce Court)

the Commerce Court makes a clear distinction between the movement of goods which is industrial and that which is transportation as such. The court said, at page 257:

> "Nor may the line be drawn on the basis of what is and what is not essential to the industry. Transportation would not flourish without manufacturing; manufacturing could not be successfully carried on without transportation; they are distinct activities; but both are essential to the industry. Raw materials must be brought to and the finished product must be carried from the mill; whether any particular service involving an actual hauling of the goods is transportation or industrial depends upon whether, on the one hand, it is an interindustry act, a step in the manufacturing process, or, on the other hand, a movement of raw material from without to the mill or of finished product from the mill toward the market. Every actual carrying of each part of the material or product is, of course, not a transportation service. The Crane Iron Works Case, supra, well illustrates this. In that case,

as in other cases therein cited (General Electric Co. v. N.Y.C. & H.R. R. R. Co., 14 Interst. Com. Com'n R. 237; Solvay Process Co. v. D. L. & W. R. R. Co., 14 Interst. Com. Com'n R. 246), it was held that the hauling between buildings of an extensive plant was a part of the manufacturing, not of the transportation operations; that the transportation ended, as to raw materials, when the common carrier had performed all that it could have been required to perform and all that it did for nonproprietary mills, that is, when it made delivery at some point on the plant; that any further activity on the part of the tap line common carrier within the plant itself could not have been compelled and was not a transportation service for which the trunk line could pay either an allowance to the industry or a division of the joint rate to the tap line as a common carrier."

It is clear that in the present case the operations of Dodge in the removal and hauling of the ores to the mill were an interindustry act and a step in the manufacturing process and not transportation as such.

It was not within the purview of Congress in the enactment of section 3475(a) that all movements of property should be taxed. This is clearly indicated by the language contained in the section that the tax shall apply only to amounts paid to a person "engaged in the business of transporting property for hire", in other words, amounts paid to common carriers in general. It would appear to be the intent of Congress, by the use of this language, to tax transportation which is essentially a movement of property

in commerce, a movement of property to or from a market, and not movements of property which are basically a part of the production of goods for commerce and for market. There is nothing in the statute which would indicate an intent on the part of Congress to tax movements of property solely upon one's own premises in the course of one's industrial operations.

As pointed out by the court in *Alexander v. Carter Oil Company,* supra, the operations carried on by Dodge Construction, Inc. were not a movement of property which would ordinarily be undertaken by a common carrier for hire, and the test would seem to be, under the decision in that case, whether or not the hauling was one which a common carrier for hire would undertake in the usual course of its business. It cannot be said that Dodge was engaged in the business of transporting property for hire in carrying out the terms of its contract with Getchell. This contract required it not only to haul ores from the mine to the mill but to actually mine the ores themselves by means of power shovels. The removal and the hauling of these ores are inseparable and do not constitute "transportation" within the purview of section 3475(a).

An examination of the regulations, and particularly section 143.13, supra, reveals that the Treasury Department has itself created an exemption from the tax on transportation in the case of transportation of coal from the mine to a preparation plant. No such

exemption of coal from the tax is provided for by section 3475(a). That section simply makes the tax on coal 4¢ per short ton instead of 3% of the amount paid, and provides that it shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation. The Treasury Department has, accordingly, created an exemption in favor of the coal industry which it now refuses to apply to other branches of the mining industry. No more reason exists for the taxation of transportation of raw ores from a mine to a mill all located on the same premises than exists in the taxation of the movement of coal from the mine to a preparation plant.

II.

The second and last question to be determined on this appeal is whether or not the hauling of crude ores from the mine to the mill or to the stockpiles, all of which took place on the premises of appellant, was transportation from one point in the United States to another.

THE HAULING OF CRUDE ORES FROM THE MINE TO THE MILL, ALL OF WHICH TOOK PLACE ON THE PREMISES OF APPELLANT WAS NOT TRANSPORTATION FROM ONE POINT IN THE UNITED STATES TO ANOTHER.

Webster defines "point" as follows:

> "A place having definite position but no extent in space; a place considered as to its position only; a spot; a geographical place or situation; a locality; as, a good point from which to start."

Under this definition, transportation from one point in the United States to another is transportation from one place in the United States to another since the words "point" and "place" are synonymous.

In the case of

Hammell v. State, 152 N.E. 161 (Indiana)

the court had occasion to define the word "place" in construing a statute of Indiana prohibiting the transportation of intoxicating liquor from one place to another. The court said, at page 163:

> "The word 'place' is defined as 'an area or portion of land marked off or regarded as marked off or separated from the rest, as by occupancy, use, or character'; and the word 'another'—different; distinct. Century Dictionary. 'Place'—a portion of space regarded as separate from the rest of space; 'another'—not the same, different. Imperial Dictionary. 'Place'—space occupied by or belonging to a thing under consideration; space regarded as abode or quarters. 'Another'—not the same; distinct; different. Standard Dictionary. 'Place'—any portion of space regarded as measured off or distinct from all other space or as appropriated to some definite object

> or use. 'Another'—one more, in addition to a former number; a second or additional one; not the same; different.

If we accept the definitions of Webster and of the other dictionaries referred to in *Hammell v. State,* supra, it is apparent that the Getchell Mine was itself "an area or portion of land marked off or regarded as marked off or separated from the rest as by occupancy, use or connection". We must, likewise, under such definitions consider the Getchell Mine as a "portion or space regarded as measured off or distinct from all other space or as appropriated to some definite object or situation". The Getchell Mine was, therefore, a place or point and all of the transportation by Dodge occurred within the confines of a single place, point or locality and there was no transportation from one point in the United States to another.

In the case of

Charles M. Lyle v. United States, 76 Fed. Supp. 787, Decided February 2, 1948

which is a case greatly similar on its facts to the case at bar, it was there held by the court that an operation of this type presented none of the elements of transportation, as that term is generally understood, and that, consequently, the transportation tax was erroneously imposed. This case appears to be the only case decided under section 3475(a) that is similar on its facts to the case at bar. This case involved an action by the plaintiff to recover from the United States the 3% transportation tax paid to the Collector of Internal Revenue. The plaintiff was engaged

in the business of constructing airfields at Tifton, Georgia and Dublin, Georgia, and as a part of and incidental to the grading and leveling of such airfield, the plaintiff employed a subcontractor who furnished trucks to receive earth from the grading shovels and to move it to the dump or fill, all of the operations of the subcontractor and the hauling of the earth being within the confines of the airport under construction. The plaintiff paid the trucking subcontractor at the rate of $2.75 per hour per truck, and a total of $38,195.47. The Commissioner of Internal Revenue assessed 3% of the amount paid the subcontractor as representing a transportation tax due under section 3475(a). A claim for refund was denied, and this action was brought. In giving judgment for the plaintiff and holding that this was not taxable transportation, the District Court said:

> *"The transactions as set forth in the findings of fact did not constitute transportation of property from one point in the United States to another, within the meaning of Section 3475 of the Internal Revenue Code,* and the payment of an hourly rental for dump trucks used only within the confines of the airfield being leveled, and as an incident of the grading and leveling of such airfield, was not a payment for the transportation of property within the terms of the statute just cited. Neither the statute, nor the regulations issued pursuant thereto, either expressly or by fair implication, evidence any applicability to transactions of the kind now under consideration, but, on the contrary, evidence intent to subject to tax liability payments made for transportation

in the manner and by the means specified as the language employed is commonly understood in the light of present day transportation practices and customs. The hauling of dirt by dump trucks hired upon an hourly basis, which are used exclusively in the leveling of an airfield, and within its confines only, presents none of the elements of transportation as that term is generally understood.

While the construction of the statute by the Commissioner of Internal Revenue is entitled to weight, in this case his determination does not appear correct to this Court.

The Complainant is entitled to recover, as prayed, the taxes paid under protest, and judgment therefor may be presented after notice." (Italics ours.)

The United States Court of Appeals for the Second Circuit in

Bridge Auto Renting Corporation v. Pedrick,
174 Fed. (2d) 733 at page 738

in commenting upon the case of *Lyle v. United States,* supra, said:

"Lyle v. United States (supra) dealt only with the removal of dirt by a sub-contractor within the limits of an airfield under construction and such 'transportation' seems plainly outside the statute and regulations."

This last cited case was decided on May 10, 1949, and while deciding against the taxpayer did, in effect, approve the decision in the *Lyle* case, this case being very closely analogous to the case at bar.

The determination of what was transportation from one point to another often arose under the Prohibition Acts of the various states during the Prohibition era. Many arrests were made for removal of liquor within the confines of a single building or across the premises of a single owner. This was almost universally held to be not transportation from place to place or from one point to another under those statutes. The leading case was that of

Commonwealth v. Waters, 77 Mas. 81

where the court said at page 84:

> "'From place to place', as used in Statutes 1855, Chapter 215, section 20, prohibiting the transportation of spirituous liquors from place to place in the state, does not mean only from town or counties, or such other territorial divisions or districts as have been or may be established by a law or by authority of the Commonwealth. It is not every possible removal of spirituous liquors which comes within the statute. If the removal were only on the premises of the owner, or from one to another of his warehouses, or were from one to another part of his shop, it would not be from place to place within the meaning of the statute."

This case was followed and cited in

Ready v. State, 290 S.W. 98 (Tenn.);
Miller v. State, 27 S.W. (2d) 803 (Texas);
England v. State, 8 Pac. (2d) 690 (Okla.).

CONCLUSION.

The plaintiff respectfully submits that there was no transportation of property by Dodge Construction, Inc. within the meaning of section 3475(a) of the Internal Revenue Code or the Regulations thereunder, and that there was no transportation of property from one point in the United States to another within the purview of that statute, and that, accordingly, the tax assessed and collected was illegally and erroneously assessed and collected, and that plaintiff should recover judgment from the United States in the amount of such tax with interest thereon.

It is submitted that the decision and judgment of the District Court of the United States, in and for the District of Nevada, should be reversed.

Dated, Reno, Nevada,
December 5, 1949.

WM. WOODBURN,
WM. J. FORMAN,
WM. K. WOODBURN,
JOHN P. THATCHER,
Attorneys for Appellant.

12329

No. ~~11,329~~

In The

United States Circuit Court of Appeals For the Ninth Circuit

GETCHELL MINE, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES

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vs.

UNITED STATES OF AMERICA,
Appellee,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 21-25) is reported in 83 F. Supp. 774.

JURISDICTION

This appeal involves a claim for refund of $6,108.73, with statutory interest thereon (R. 5), which includes $5,003.62 federal transportation tax and $1,105.11 accrued interest thereon paid to the appellee on March 4, 1946 (R. 4, 13, 23). Claim for refund was timely filed on or about July 1, 1946, and denied by the Commissioner of Internal Revenue on October 2, 1946. (R. 17, 23). Suit for refund was filed in the

District Court on March 1, 1947 (R. 2-12), conformably with Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under Section 24, Twentieth, of the Judicial Code, now 28 U. S. C., Section 1346. The judgment of the District Court was entered January 24, 1949. (R. 26). A motion for a new trial was denied June 15, 1949. (R. 27-28). Notice of appeal was filed July 29, 1949 (R. 26-27), conformably with 28 U. S. C., Section 1291, upon which the jurisdiction of this Court rests.

QUESTION PRESENTED

Whether payments made by the taxpayer to an independent contractor, engaged in the business of transporting property for hire, for services rendered during the period December 1, 1942, to April 30, 1944, inclusive, in hauling by motor vehicles or trucks quantities of gold and tungsten ores over private roads which were owned, built, and maintained by the taxpayer upon property which it owned in fee simple,* constituted an amount paid for the transportation of property by motor vehicle from one point in the United States to another within the meaning of Section 3475(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are set forth in an Appendix, *infra*.

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*Excepting only that part of the hauling of ores for a distance of approximately one mile was over a road built and maintained by the taxpayer upon land owned by the United States of America.

STATEMENT

The facts, which were stipulated (R. 14-19), and found by the District Court (R. 21-25), may be summarized as follows:

Taxpayer is a Nevada corporation operating a mining property known as the "Getchell Mine" in Humboldt County, Nevada. In the course of its mining operations, the taxpayer extracts and moves tungsten and gold ores from natural deposits in the earth to surface ground. Such ores must then be removed and transported to its mill for treatment. Under an oral contract with another Nevada corporation, Dodge Construction, Inc., the latter removed from surface ground by the use of power shovels and transported by motor trucks taxpayer's ore from spots near the mine mouth to designated stockpiles or to the taxpayer's mill for treatment. All of such transportation took place on private roads owned, built, and maintained by the taxpayer upon properties acquired by it prior to 1937 and owned by it in fee simple, except that during part of the hauling of ore from the Granite Creek Mine to the Getchell mill the ore was transported over a road built and maintained by the taxpayer for a distance of approximately one mile across part of a section of land owned by the United States of America. For such removal and transportation Dodge Construction, Inc., was paid sums ranging from 25c to $1 per cubic yard, depending on the distance ore was transported, which varied from 300 feet to seven miles. (R. 15-16).

On and after December 1, 1942, up to and including April

30, 1944, Dodge Construction, Inc., transported quantities of tungsten and gold ore under its contract with the taxpayer who paid therefor the sum of $166,787.31. In the performance of its contract and in the transportation of the ore, Dodge Construction, Inc., was an independent contractor engaged in the business of transporting property for hire. The Commissioner of Internal Revenue determined a federal transportation tax of $5,003.62 to be due upon the sum paid by the taxpayer, as aforesaid. This tax, together with interest amounting to $1,105.11, aggregating $6,108.73, was thereafter duly and regularly assessed and paid by the taxpayer on March 4, 1946. (R. 16-17).

The taxpayer filed a formal claim for refund on or about July 1, 1946, to recover its payment of $6,108.73. That claim was denied by the Commissioner of Internal Revenue on October 2, 1946. (R. 17).

The District Court denied recovery to the taxpayer, holding that there was transportation of property by Dodge Construction, Inc., within the meaning of Section 3475 of the Internal Revenue Code, or the Regulations thereunder, and that the tax in question was legally assessed and collected. (R. 25). The District Court's findings of fact include the following (R. 23):

> 4. That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction, Inc., transported under such contract divers quantities of tungsten and gold ores under the terms of the contract and received payment therefor from plaintiff in the sum of $166,787.31. That in the performance of said contract and the transportation of

said ores, Dodge Construction, Inc., was an independent contractor and was engaged in the business of transporting property for hire within the meaning of Section 3475, Title 26, United States Code.

SUMMARY OF ARGUMENT

The federal transportation tax effective December 1, 1942, was imposed upon amounts thereafter paid within the United States for transportation services rendered in the United States on or after that date by a person who was in the business of transportating property for hire. Section 3475 (a) of the Internal Revenue Code, as added by Section 620(a) of the Revenue Act of 1942. The statute enacted and the transportation tax levied as part of a wartime Revenue Act which included many other taxes upon new sources of revenue and the enlargement of taxes upon existing sources. A similar tax was imposed by Section 500 of the Revenue Acts of 1917, c. 63, 40 Stat. 300, and 1918, c. 18, 40 Stat. 1057.

Under the agreed and stipulated facts as they were adopted in the District Court's findings of fact, there can be no question now as to whether (1) there was transportation (2) of property (3) by trucks or motor vehicles (4) from one point in the United States to another (5) and payment therefor made in the United States by the taxpayer to (6) a person engaged in the business of transporting property for hire. Normally it would follow, as the District Court held, that the controverted tax was due and owing from the taxpayer to the United States. If due, there is no question that it was lawfully collected.

The taxpayer's arguments, believed to be without merit, suggest exceptions to or imply exemptions in what seems to be the plain meaning from a literal reading of the applicable statutory language. One argument rests upon the assumed premise that all of the transportation of the taxpayer's ore by Dodge Construction, Inc., was simply an incidental part of its mining operations; that the removal and hauling of ore from a mine mouth to a mill or stockpile is merely an inter-industry act and a step in the manufacturing process; and that, therefore, the admitted transportation was not taxable transportation as such but a movement of property exempt from tax. Another alternative argument, applicable even if the transportation in question might otherwise properly have been subjected to tax, is based upon the premise that there can be no material difference or distinction in the use of the words "point," "place," or "spot" so that any and all transportation upon the taxpayer's property known as the Getchell Mine occurred within the confines of a single place, point, or locality. This means that the statutory phrase "from one point in the United States to another" never applies to transportation by motor vehicle upon or across a taxpayer's property. Each argument suggests an implied exemption to the ordinary meaning of the statutory language that is plainly stated. Both arguments propose exceptions to what otherwise clearly is the intent of ordinary words in common and constant use.

ARGUMENT

I

Amounts paid within the United States after December 1, 1942, to persons engaged in the business of transporting property for hire, for transportation of property by motor vehicle in the United States on or after that date (excepting certain transportation of coal), have been subject to the federal transportation tax.

For the purposes of this argument, the material portion of the applicable statutory language may be restated as follows: There shall be imposed upon the amount paid to a person, engaged in the business of transporting property for hire, for the transportation of property by motor vehicle from one point in the United States to another, a tax. The term "transportation" is defined in Section 143.1(d) of Treasury Regulations 113 (Appendix, *infra*), to include local movements of property, and loading and unloading services furnished in connection with a transportation movement.

There is no basis for giving a restricted meaning to the statutory language. The term "transportation *** of property by *** motor vehicle" is all-inclusive and certainly is broad enough to include all movement of property by truck, whether upon privately owned land or upon public highways, and regardless of the purpose or reason for the transportation, where the transportation is done by a person engaged in that business. The Regulations are clearly within the statute in providing that the language includes purely local movements including loading, unloading, and transfer

in transit. Under neither the statute nor the Regulations is there a basis for excluding from the tax any transportation of property by a person engaged in the business of transporting property for hire, and this is true where such transportation is incidental to a continuing process of manufacture, or mining and milling.

The situation in this case comes precisely within the language of the statue and Regulations. Dodge Construction, Inc., a person engaged independently in the business of transporting property for hire, carried taxpayer's ore by truck from its mine to designated stock piles or to its mill for treatment. The ore was loaded at the mill, the point of origin, and transported to the point of destination, where it was unloaded. There was thus transportation from one point or place to another, irrespective of the fact that both points may have been on its property and irrespective of the fact that the reason for the transportation was to stockpile the ore or to prepare it for market.

The following discussion will confirm that the statutory language is not to be circumscribed, and that the Regulations are a valid interpretation of the statute. It will also show more fully that the taxpayer's arguments (1) that there was no transportation of its ore in the statutory sense because the transportation was an incident of processing the ore for sale, and (2) that in any event there was no transportation from one point to another where the ore did not leave its property, are without merit.

As stated above, the applicable statutory language is part of a wartime Revenue Act which was passed by Congress

and approved by the President in 1942 to raise additional federal taxes from old sources and more tax from new sources, all necessary for successful participation in World War II. Similar legislation, referred to above as having been enacted in 1917 and 1918, was likewise part of an attempt to increase federal tax revenues during World War I. It seems reasonable to conclude that Congress had in mind reaching as a source of more tax all transportation of all property, except that which was expressly excluded. Members of Congress and of its Committees are presumed to have known that many taxpayers who were their constituents regularly and customarily hired transportation of property to, upon, and away from their premises. Farmers used public transportation, especially by motor trucks, for grain, hay, livestock, and timber. Merchants paid for transportation of goods to and from their places of business and warehouses by motor trucks, railway, and water. Manufacturers paid for similar types of transportation of raw and finished goods to and away from their factories, upon and across their premises. Other mining companies operated under conditions similar to those in the instant case. The situation was one of general application and of material importance both to the Government and to taxpayers in 1942. The statute was unquestionably intended to create an added burden upon an established class of taxpayers who had paid no such excise tax except during World War I. This statute is still in effect.

There ordinarily can be no justification for a narrow construction of statutory language in a revenue measure intended to raise more tax money for war. No matter how

burdensome the tax may be, there is every reason properly to say that the literal reading of the language used is the only correct answer to a question as to what it was intended to mean. The subject of all construction is to ascertain the legislative intent and "If the language be clear it is conclusive." *Osaka Shosen Line* v. *United States,* 300 U.S. 98, 101, citing *United States* v. *Hartwell,* 6 Wall. 385, 396. It matters not that such construction operates to the disadvantage of one or more taxpayers and to some extent imposes an economic impediment to the activity taxed as compared with others not taxed. It is settled "and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." *Sonzinsky* v. *United States,* 300 U. S. 506, 513. Taxpayer might have avoided the tax by the use of its own trucks or by leasing from Dodge Construction, Inc., the trucks which were used, under a rule in M.T. 9, 1943 Cum. Bull. 1159, and a decision in *Ohio River Sand Co.* v. *United States,* 60 F. Supp. 563 (W.D. Ky.).** However, present knowledge that a taxpayer might have lawfully avoided a tax by using another form of transaction "furnishes no reason for relieving him of tax when, for whatever reason, he chooses a mode of dealing within the terms of the Act." *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275. Equality in taxation and questions of "equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in

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** Cf. **Bridge Auto Renting Corp.** v. **Pedrick,** 174 F. 2d 733, 737-738, (C.A. 2d), certiorari denied October 17, 1949, which limits this rule to the rental of trucks without drivers.

particular instances or with respect to particular taxpayers." *Colgate* v. *Harvey,* 296 U. S. 404, 436.

There is a well recognized principle of statutory construction applicable in federal tax cases that a taxing statute of doubtful intent should be construed favorably to a taxpayer. The following excerpt from *Gould* v. *Gould,* 245 U. S. 151 153, is frequently cited as the leading statement of the rule:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.

This rule is never applied when the statute is free from doubt (*Hecht* v. *Malley,* 265 U.S. 144, 156), and it is only applied in situations of extraordinary doubt (*United States* v. *Wetherell,* 65 Fed. 987, 990 (C.A. 1st)). Morover, in *White* v. *United States,* 305 U.S. 281, 292, the Court said:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

The Government submits that the statutory language determinative of any issue in the instant case, particularly the word "point," is free from reasonable doubt. The fol-

lowing excerpt from *Helvering* v. *Stockholms &c. Bank,* 293 U.S. 84, is apposite in the circumstances (pp. 93-94):

> In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts "are not to be extended by implication beyond the clear import of the language used," and that doubts are to be resolved against government and in favor of the taxpayer. The rule is a salutary one, but it does not apply here. The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein* v. *Lane,* L. R. 2 Q. B. Cases 144, 151. The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear less heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means.

It is also well established that Regulations have the force and effect of statute law if they are reasonable and come within the law with respect to which they are issued. *Commissioner* v. *Wheeler,* 324 U.S. 542, 547; *Maryland Casualty Co.* v. *United States,* 251 U.S. 342, 349. Of course, a regulation which does more than seek to carry out the intent of Congress and therefore alters or amends the law is without force or effect. *Manhattan Co.* v. *Commissioner,* 297 U.S.

129. But it has long been the settled rule that a practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Brewster* v. *Gage,* 280 U.S. 327, 336; *National Lead Co.* v. *United States,* 252 U.S. 140, 145-146; *Carlisle* v. *Commissioner,* 165 F. 2d 645, 648 (C.A. 6th). Moreover, in *Brewster* v. *Gage, supra,* the United States Supreme Court said (p. 337):

> The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation.

See also *Commissioner* v. *Wheeler, supra,* p. 547, footnote 10. The Regulations applicable in the instant case have been in effect from February 1, 1943, and Congress has since amended the Internal Revenue Code several times. One of these amendments in Section 307(a)(9) of the Revenue Act of 1943, c. 63, 58 Stat. 21, expressly related to Section 3475(b), which was also amended by the Act of November 4, 1943, c. 294, 57 Stat. 585, and further amended by Section 6 of the Act of December 29, 1945, c. 652, 59 Stat. 671. None of the changes are material to any argument in the instant case.

The applicable Reuglations are certainly not unreasonable. They surely are not inconsistent with the statutory language. They constitute contemporaneous construction by those charged with the administration of the statute. They do apply to purely local movements of property including "switching," which may and often does take place entirely upon the property of a taxpayer. Section 143.1(d),

Treasury Regulations 113. There are no reasons, weighty or otherwise, which warrant a conclusion that the transportation in the instant case was not taxable transportation. The Regulations apply in the circumstances here and they should be sustained under the rule in *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501, namely:

> This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of those statutes which should not be overruled except for weighty reasons.

If the language of Section 3475 of the Internal Revenue Code is clear and not of doubtful meaning, then it applies to the undisputed facts in this case. There was taxable transportation upon which the federal tax has been lawfully collected. The judgment below should be affirmed. The same conclusion follows even if it be assumed, *arguendo*, that some words in this statute might have doubtful meaning. The rule stated in *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, is applicable (p. 273):

> But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed."

The taxpayer's claim for exemption from transportation tax cannot rest upon mere implication. *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606; *United States* v. *Stewart*, 311 U.S. 60, 71; *U. S. Trust Co.* v. *Helvering*, 307 U.S. 57, 60. Taxpayer's argument (Br. 24) that the

provisions of Section 143.13(b) (Appendix, *infra*) "created an exemption from the tax on transportation in the case of transportation of coal from the mine to a preparation plant," has no application to any issue in the instant case. The conclusion (Br. 25) that "No more reason exists for the taxation of transportation of raw ores from a mine to a mill all located on the same premises than exists in the taxation of the movement of coal from the mine to a preparation plant" may well be true in theory, but it disregards what Congress provided. Congress saw fit to grant different, and even what may be termed preferential, treatment to coal producers. Section 3475(a) of the Internal Revenue Code imposes a tax generally upon amounts paid for transportation of property of "3 per centum of the amount so paid," but in the same sentence further provides, "except that, in the case of coal, the rate of tax shall be 4 cents per short ton." The last sentence in Section 3475(a) reads: "The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation." This means that a particular quantity of coal is subject to a tax of 4c per short ton, imposed as an excise for the transportation of that coal. Such tax applies but once to any short ton of coal, regardless of when, where, how short or how far a distance, or how many times it may be transported. This distinction is important.

Granting that there may be a similarity between the

physical process of transporting the taxpayer's ores and another taxpayer's coal the applicable statute and Regulations clearly require a different treatment. With respect to the tax on coal transportation, the law presented an administrative problem for the Commissioner of Internal Revenue in that he was obliged to determine by regulation at what point in transportation or at what time the tax of 4c per short ton would apply. This is covered in Section 143.13(b), providing in substance that the tax applies to the first transportation for hire which takes place after the coal has been prepared for commercial use. The statutory language is plain and the provisions in the Regulations relating thereto are reasonable. There never has been any basis for a similar treatment of any property other than coal. Taxpayer's argument is of no avail in the circumstances here.

Granting also that the wisdom of such legislation might be questioned upon the ground that it affords preferential treatment to one class of taxpayers, this relates to a matter of policy. This is a matter as to which the Court will have no concern. *Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 490-493.

II

Amounts paid within the United States since December 1, 1942, to a person engaged in the business of transporting property for hire, for the transportation by motor truck of gold and tungsten ore in the United States on or after that date, have been subject to the federal transportation tax.

Taxpayer first argues that the transportation of ore under the facts in this case was a nontaxable movement of property for the reason that it (Br. 16) "was merely a part of and incidental to the mining operations," and says (Br. 17):

> The removal from the earth and the transportation to the mill were a part and parcel of the production by appellant of a final product designed for sale.

Taxpayer construes the applicable statute to tax only (Br. 23-24)—

> transportation which is essentially a movement of property in commerce, a movement of property to or from a market, and not movements of property which are basically a part of the production of goods for commerce and for market.

The mere fact that the transportation in question was an integral part of a mining operation and a movement upon and across the taxpayer's own premises cannot be important. Otherwise taxpayer's argument has general application to all mining, to industry and to argiculture. Commercial transportation of automobile parts from manufacturing plants to an assembling plant; of prefabricated materials and unassembled parts of machinery; of cattle, hay, grain, and other farm products includes movement by motor vehicles and railroad cars upon private as well as

public property. Such transportation of ore, auto parts, and cattle, under taxpayer's argument, could be a movement from one unit of a business to another unit of the same business and a part of, or incidental to, the production of goods for commerce and for market. Taxpayer's argument, if sound, is obviously important not only to taxpayers generally but to the federal revenue.

It may be conceded, *arguendo,* that the movement of the taxpayer's ore upon its own premises was an inter-industry act, a step in the manufacturing process, an incidental part of its mining operations, and and essential part of its mining business. It does not follow therefrom that there was no taxable transportation or that the tax in controversy was one imposed upon the taxpayer's mining operations. The movement of ore from mine to mill was "transportation" of "property" within the plain meaning of the law and Regulations. Congress made no exception in favor of the mining industry. The Commissioner of Internal Revenue was powerless to do so by Regulations. The fact that Congress did provide for different treatment of the coal industry supports a conclusion that no exemption was intended to apply to other kinds of mining operations. Neither is there any basis for a presumption that Congress intended the transportation tax to apply only to payments for movements of finished or commercially salable products of mines nor, when transported by motor vehicles, only to movements upon public highways or off of the taxpayer's own premises. Taxpayer's argument goes to a policy matter concerning the wisdom of the legislation which is of no concern in a construction of the language actually used.

Packard Co. v. *National Labor Relations Board,* 330 U.S. 485. The following excerpt from the opinion in *Utah Junk Co.* v. *Porter,* 328 U.S. 39, is particularly apposite (p. 44):

> All construction is the ascertainment of meaning. And literalness may strangle meaning. But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy. Insofar as such considerations are revelant here, however, they tell against cutting down the natural meaning of the language Congress chose.

Taxpayer's argument ignores the one essential fact that is of controlling importance. The taxpayer's problem arose simply and solely because it paid to a commercial carrier, or a person engaged in the business of transporting property for hire, charges for trucking its ore. The taxpayer could have purchased and used its own trucks to transport that ore, or it could have rented trucks owned by others. In either event, no tax would have attached to the movement of its property with such equipment.

The pipeline cases cited by taxpayer (Br. 18, 20) are not apposite. Regulations applicable to the transportation of oil by pipeline expressly provided that the tax did not apply to any transportation which was incidental to production. They also exempted transportation which was incidental to manufacturing and refining operations. Taxable movements of oil must also have been similar to movements which pipeline carriers usually undertake and perform. There are no comparable Regulations or administra-

tive rulings applicable in the instant case. This material difference appears on page 925 of the opinion in *Jones* v. *Continental Oil Co.*, 141 F. 2d 923 (C.A. 10th), cited on page 20 of taxpayer's brief. It appears even more clearly in cases cited on page 926 of the *Continental Oil Company* opinion, particularly *McKeever* v. *Fontenot*, 104 F. 2d 326 (C.A. 5th); *Caminol Co.* v. *United States*, 41 F. Supp. 819 (S.D. Cal.); *Big Lake Oil Co.* v. *Driscoll*, 40 F. Supp. 510 (W.D. Pa.); *Mohawk Petroleum Co.* v. *Lewis*, 19 F. Supp. 867 (N.D. Cal.). These decisions expressly refer to Regulations promulgated under the Revenue Act of 1932, c. 209, 47 Stat. 169, and prior to the enactment of the Internal Revenue Code. The case of *Alexander* v. *Carter Oil Co.*, 53 F. 2d 964 (C.A. 10th), cited on page 18 of the taxpayer's brief, arose under the Revenue Act of 1918, and shows that (p. 966) there was an administrative ruling which exempted from tax all transportation of oil which was incidental to the taxpayer's production or refining business. Moreover, the tax on transportation of crude petroleum did apply to transportation upon the taxpayer's own premises. *Magnolia Petroleum Co.* v. *United States*, 53 F. Supp. 231 (CCls.), certiorari denied, 323 U.S. 721. Moreover, as is made clear in *Continental Oil Co.* v. *Jones*, 176 F. 2d 519 (C.A. 10th), the 1942 edition of the Regulations relating to transportation of oil by pipeline, which the court held valid, provides for taxation where the movement is from stablization plants at the wells to storage tanks, and this irrespective of whether such movement is an incident of production and whether it occurred on the taxpayer's premises.

III

The statutory phrase "from one point in the United States to another" covered transportation upon and across land owned by the taxpayer.

The definition of the word "point," quoted on page 26 of the taxpayer's brief, appears in Webster's New International Dictionary (1949 ed.) p. 1903. Even though the words "point" and "place" may be synonymous, the Government cannot accept the conclusion that (Br. 27)—

> The Getchell Mine was, therefore, a place or point and all of the transportation by Dodge occurred within the confines of a single place, point or locality and there was no transportation from one point in the United States to another.

The point of origin and the point of destination of any commercial shipment varies with the type of transportation. Railroads transport from station to station, planes from airport to airport, trucks from point to point or from place to place. Taxpayer's argument (Br. 27) that the premises of the Getchell Mine are a point, which is premised upon the dictionary definition that point and place are sometimes synonymous, plainly ignores the ordinary use of the word "point" in reference to transportation by truck. This type of transportation is most often used from point to point upon a place or within a town. When so used, point is manifestly not synonymous with place if the latter is intended to mean a larger area than that necessary to load or unload a motor vehicle. The word "point" used in the applicable statute means a particular spot which is the point or place of origin and another spot which is the point or place of

destination. Even though the words point and place are synonymous, neither one nor both properly can be used to describe an area embracing all of the Getchell Mine property.

Taxpayer's argument, as applied to transportation during 1942 and later years and as it relates to the particular question under consideration here, ignores the known fact that "point" or "place" refers either to the origin of a shipment or to its destination. This is never a large area but always a designated spot within an area. The transportation in question in the instant case was from one spot to another spot upon the taxpayer's premises, necessarily from one point or place to another point or place upon the Getchell Mine property. The actual point of origin and the point of destination are shown with sufficient accuracy upon the map that was made part of the stipulation in this case (R. 19), showing the roads used by Dodge Construction, Inc., in transporting the taxpayer's ore. As used in this argument, the word "point" is surely free from reasonable doubt. Its use in the transportation tax statute manifestly refers to the "point of origin" and "point of destination" of any shipment by commercial carrier. The ordinary or settled meaning of a word prevails. *Avery* v. *Commissioner,* 292 U.S. 210, 214. We must assume that Congress had a reasonable understanding of the term it employed to express its intention and that it knew the then commercial usage of the word "point." *United States* v. *Van Nostrand,* 94 F. 2d 510, 512 (C.A. 1st).

Taxpayer's argument, if sound, exempts from the federal transportation tax all shipments of property by railroad

from one station to another and all movements of property by motor vehicles from a point of origin to a point of destination, whenever both stations or each point are located upon the same mine, ranch or property owned by the taxpayer. This conclusion, in effect, adds to the statutory language an exception to its literal meaning so that by construction the statutory phrase will read "from one point in the United States to another, excluding all transportation upon property of a person subject to the tax." If this be what Congress intended it readily could have said so, but it did not and we cannot assume it meant what it did not say. *United States* v. *Van Nostrand, supra,* p. 512. Taxpayer's broad interpretation of the language used by Congress amounts to a claim for tax exemption, something that is never granted by implication. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 606. If it be assumed, *arguendo,* that there is any justification for an argument that Congress should have made the tax inapplicable to transportation upon a taxpayer's farm, ranch, mine or other commercial property, then this goes to a policy matter concerning the wisdom of the legislation which is of no concern in a construction of language actually used. *Packard Co.* v. *National Labor Relations Board, supra; Utah Junk Co.* v. *Porter, supra.*

Taxpayer's conclusion that its entire mine property was (Br. 27) "a single place, point or locality" necessarily implies that Dodge Construction, Inc., could have hauled the ore to any spot on the entire Getchell Mine premises and dumped it at will. But that ore was not waste material which might have been disposed of by the carrier as it saw

fit. Dodge Construction, Inc., had a well defined route or routes of transportation from one spot to another. The map in evidence (R. 19) shows these spots to have been of relatively small area. They were designated by the taxpayer as the shipper of the ore. In such circumstances, any argument that "point" means the entire Getchell property appears to be futile and absurd. This is even more apparent when the situation here is contrasted with that covered in an inapplicable administrative ruling in M.T. 13, 1943 Cum. Bull. 1161, reading in part:

> Where a person contracts with a carrier for the transportation of waste material from his plant or premises to a designated place, the amount paid to the carrier is taxable under section 3475 of the Internal Revenue Code, since it is a payment for transportation of property from one point in the United States to another. However, an amount paid to a carrier for removal of waste material where the carrier is permitted to dispose of the material as it sees fit is not taxable under that section. The amount paid under such circumstances is considered as a payment for a disposal service rather than for the transportation of property from one point in the United States to another.

The decision in *Lyle* v. *United States*, 76 F. Supp. 787 (N.D. Ga.), cited on page 27 of the taxpayer's brief, and therein said to be similar on its facts to the case at bar, fairly cannot be apposite. The Court found that the transportation tax in that case was assessed against the plaintiff in an amount representing 3% of the payments made to his subcontractor for services rendered in furnishing dump trucks with drivers for use in the leveling and grading of an airfield. The dump trucks received earth from the grading shovel and moved it to the closely situated dump or fill

on the same field. In the circumstances the transportation was regarded as insignificant. Moreover, there was no finding that the subcontractor was engaged in the business of transporting property for hire, and the absence of a showing to this effect would defeat the tax. The facts of this case are entirely different. Here there was transportation of ore from the mine to stockpiles or the mill, two definite points of origin and destination, instead of merely a grading and filling operation on a field. Moreover, the transportation was done in this case by a company engaged in the business of transporting property for hire.

The liquor cases cited on page 30 of the appellant's brief are also inapposite. Those decisions and many others, including the *Liquor Transportation Cases,* 140 Tenn. 582, 593-594, 205 S. W. 423, 426, all to the same effect, show that state courts have rather uniformly held that the transportation of intoxicating beverages by any person upon and across his own premises was not enough to support a conviction for illegal transportation. Those decisions rest upon the premise that it was not unlawful for a person to procure and to consume liquor in his own home which necessarily could be done only if the liquor was moved or transported from place to place within and without the person's dwelling and upon his premises. The phrases "from one place to another" and "from one point to another," as used in the state criminal statutes, were held synonymous and held to mean not less than from one premises to another. There is no proper analogy to any issue in the instant case. Moreover, state law and decisions of state courts are controlling only when the federal taxing Act by express language or

necessary implication makes its operation dependent upon state law. *Lyeth* v. *Hoey,* 305 U.S. 188, 194.

CONCLUSION

The facts stipulated and found by the trial court are sufficient to support the judgment. The tax in controversy was lawfully collected upon an assessment which was duly and regularly made by the Commissioner of Internal Revenue. The decision of the District is correct and it should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

SEC. 3475 [as added by Sec. 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. TRANSPORTATION OF PROPERTY.

(a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * *

(26 U.S.C. 1946 ed., Sec. 3475.)

Treasury Regulations 113 (1943 ed.):

SEC. 143.1 *Meaning of Terms.*—As used in these regulations, unless otherwise specified or indicated by the context—

(*a*) *General.*—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(*b*) *Person engaged in the business of transporting property for hire.*—The term "person engaged in the business of transporting property for hire" includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(*c*) *Carrier.*—The term "carrier" is coextensive with the term "person engaged in the business of transporting property for hire."

(*d*) *Transportation.*—The term "transportation" as used herein means the movement of property by a person engaged in the business of transporting property for hire, including interstate, intra state, and intracity or other local movements, as well as towing, ferrying, switching, etc. In general, it includes accessorial services furnished in connection with the transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

(*e*) *Property.*—The term "property" means any physical matter regardless of value over which the right of ownership or control may be exercised, including currency, documents, papers of all kinds, etc.

(*f*) *Coal.*—The term "coal" as used herein includes

anthracite, bituminous, semibituminous, sub- bituminous, and lignite coal, coal dust, and coke, and briquettes made from coal.

(*g*) [as added by T.D. 5284, 1943 Cum. Bull. 1158] *Preparation plant.*—The term "preparation plant" means a plant operated in connection with mining operations at which coal is subjected to one or more processes, such as washing, crushing or sizing, intended to remove impurities or foreign matter or otherwise render the coal better suited for consumption, but not including a preparation plant operated as part of or in conjunction with any other establishment or place (such as a steel plant, coke oven, etc.) where coal is consumed as fuel or in the production of coke, briquettes, or other articles or materials.

* * *

SEC. 143.13 *Application of Tax.*—(*a*) [as amended by T.D. 5354, 1944 Cum. Bull. 657] *In general.*—The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. (See section 143.50.)

The tax applies to the total amount paid within the United States for transportation of property from one point in the United States to another even though while en route part of the transportation movement is through a foreign country.

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or

similar person for transportation with respect to which a tax is payable to such person.

The tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

In the case of property transported from a point without the United States to a point within the United States the tax applies to any amount paid within the United States for that part of the transportation which takes place within the United States.

Where the amount paid in the United States covers the entire movement of property from point of origin in a foreign country to an inland point in the United States, the tax will apply to the pro rata part of such payment which represents transportation within the United States. However, in the case of shipments of foreign origin arriving by water, no tax will attach to transportation or services performed prior to the unlading of property at the port of first arrival.

The tax does not apply: (1) to an amount paid outside the United States for the transportation of property from a point without the United States to a point within the United States; (2) to an amount paid by a carrier, freight forwarder, express company, or similar person for the transportation of property with respect to which a tax is payable to such carrier, freight forwarder, express company, or similar person; or (3) to an amount paid for the transportation of property

in course of exportation or shipment to a possession of the United States and actually so exported or shipped (see section 143.30. For governmental exemptions see Subpart D.

(*b*) [as amended by T.D. 5284, 1943 Cum. Bull. 1158] *Coal.*—An amount paid after December 1, 1942, with respect to the first transportation for hire originating on or after that date of coal is subject to tax, except that an amount paid for the transportation of coal from the mine to a preparation plant as defined in section 143.1 (g) is not taxable, but the tax attaches to the first subsequent transportation for hire of the coal.

An amount paid for the transportation of coke or briquettes made from coal is not subject to tax, provided there has been a previous taxable transportation of the coal or coal dust from which such coke or briquettes were manufactured.

When a person delivers to a carrier a quantity of coal for a transportation movement, and the transportation tax has previously been paid with respect to the coal so delivered, a statement to that effect shall be endorsed on the bill of lading or other shipping papers. This endorsement shall constitute authority to the carrier not to collect tax with respect to the transportation charges due on such shipment.

No. ~~11,329~~

IN THE

United States Court of Appeals

For the Ninth Circuit

GETCHELL MINE, INC. (a corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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JAN 11 1950

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APPELLANT'S REPLY BRIEF.

The following is respectfully submitted to the Court in reply to the brief of the United States.

I.

THE APPELLEE HAS NOT CORRECTLY STATED THE FACTS PRESENTED BY THE FINDINGS.

The position of the United States seems to be founded upon certain misapprehensions of fact which are set forth in its brief. These misapprehensions are as follows:

1. In the statement on page 3 of the brief of the United States, the following language is used: "Un-

der an oral contract with another Nevada corporation, Dodge Construction, Inc., the latter removed from surface ground by the use of power shovels and transported by motor trucks taxpayer's ore from spots near the mine mouth to designated stockpiles or to the taxpayer's mill for treatment."

There is nothing in the findings of the Court or stipulation of facts that Dodge Construction, Inc. removed ore from surface ground from spots near the mine mouth to designated stockpiles or to the taxpayer's mill. The finding of the Court is: "Dodge Construction agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment." (Tr. p. 22).

2. It is stated in the brief of the United States, page 8: "Dodge Construction, Inc., a person engaged independently in the business of transporting property for hire, carried taxpayer's ore by truck from its mine to designated stock piles or to its mill for treatment." There is no finding of fact or stipulation of fact that Dodge Construction, Inc. was, apart from the particular transaction with Getchell Mine, a "person engaged independently in the business of transporting property for hire."

3. It is stated in the brief of the United States, page 8: "The ore was loaded at the mill, the point of origin, and transported to the point of destination, where it was unloaded." There is no finding by the Court or stipulation of fact to this effect.

II.

THE CONTRACT OF DODGE CONSTRUCTION, INC. WITH GETCHELL WAS NOT MERELY A CONTRACT FOR THE HAULING OF CRUDE ORES.

From these three misapprehensions of fact, which are not in accord with the findings of the lower Court and stipulation of facts, the United States has concluded that the agreement of Dodge Construction, Inc. with the appellee was merely a contract for the transportation of ores already mined from the mining properties to the mill. The finding of the Court is that Dodge Construction, Inc. "agreed to remove, *by the use of power shovels,* gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc. was paid sums ranging from 25¢ to $1.00 per cubic yard, depending on the distance said ores were transported, which varied from 300 feet to 7 miles." (Tr. p. 22). The contract of Dodge Construction, Inc. with appellant was not merely to haul the ores from the mine mouth to the mill but to remove the ores from Getchell premises by the use of power shovels and transport the same to the mill. For both the removal by the use of power shovels and the transportation, Dodge was paid a flat sum varying with the distance from the mill. The brief of the United States assumes that this removal by the use of power shovels was merely a loading operation. In ordinary mining parlance, the removal of ores from mining properties, as found by the Court, means the separation of the ores

by power shovels from the earth in which they are contained, which is basically a mining operation. Accordingly, Dodge Construction, Inc. was paid a flat sum per cubic yard for a single operation which involved both the mining of the ores by the use of power shovels and the transportation of those ores from the place where they were mined to the mill or to stockpiles. This operation by Dodge Construction, Inc. was, at its inception, a mining operation and in the performance of such operation Dodge was not engaged in the business of transporting property for hire, the transportation being merely incidental to the removal of the ores. On the record, therefore, the assumption of the United States that the agreement between Dodge and Getchell involved merely a hauling operation is incorrect. Likewise, on the record, it is apparent that in the performance of the agreement between Dodge and Getchell, Dodge was not engaged "independently" in the business of transporting property for hire.

There is nothing in section 3475(a) of the Internal Revenue Code to indicate that the performance of such an agreement, to-wit, the mining of the ores and the carriage of those ores to the Getchell mill are the subject of the tax imposed by that section or that section 3475(a) would require the imposition of a tax upon an operation by an independent contractor which is basically a part of the mining operations carried on by the taxpayer. In this respect, it is of no consequence that the taxpayer elected to pay an independent contractor for the performance of these services

rather than to perform the operation itself since the primary business of the taxpayer was the production of gold and silver bullion from ores found in the earth and the movement of ores from the mine to the mill was merely incidental to and a part of such production.

The Bureau itself seems to have recognized that a transaction such as was involved in the agreement between the taxpayer and Dodge does not involve taxable transportation of property. In a special ruling, dated January 21, 1946, signed by W. F. Sherwood, Acting Commissioner, and reported in 464 C.C.H., paragraph 6304, it appeared that an owner of timber land entered into a contract with an independent contractor to log all merchantable timber on a certain tract of land and to deliver the logs to a pond for a total consideration of $8.25 per thousand feet. The contract called for loading trucks with logs at the place where the logs were felled and for trucking the same to the pond. All of the equipment used by the independent contractor was owned by the owner of the land. The ruling says:

> "In the affidavits submitted, it is pointed out that the cost of transporting the logs by truck is only a small part of the total contract price. It is also stated that the average distance of log movement by truck does not vary substantially from the average distance of log movement out of the woods by means of tractor and donkey engine.
>
> Careful consideration has been given to the evidence presented by you and it is now the opinion of the Bureau that, in carrying out the terms

> of the logging contracts submitted, the A Company and the B Company are not persons engaged in the business of transporting property for hire within the meaning of section 3475 of the Internal Revenue Code. Accordingly, you are not liable for payment of transportation tax on any portion of the amounts paid by you to these companies under such contracts, or payments made by you under similar logging contracts with other loggers."

We believe there is a clear distinction between transportation per se, within the scope of the tax effect of section 3475(a) of the Internal Revenue Code, and transportation carried on completely within the premises of the producer in furtherance of its business.

In a recent decision of the Interstate Commerce Commission in

> *Lenoir Chair Company,* Contract Carrier Application, Reported in United States Law Week, 18 Law Week 2238, Decided November 8, 1949,

the Commission had occasion to decide whether a manufacturer which transported its own products outbound and supplies for its factory inbound was engaged in transportation for hire where its transportation charges were invoiced separately and were comparable to those charged by common carriers. In holding that, under the facts above, the applicant was not engaged in transportation for hire, the Commission said:

> "If the facts establish that the primary business of an operator is the supplying of transpor-

tation for compensation, then the carrier's status is established, though the operator may be the owner, at the time of the goods transported and may be transporting them for the purpose of sale. If, on the other hand, the primary business of an operator is found to be manufacturing or some other non-carrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or factory enterprise with the purpose of profiting from the transportation performed. They cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise."

It appears also in the present case that the primary function of Dodge under the agreement was to remove the ores by the use of power shovels, such removal constituting a part of the mining operations of Getchell. The carriage of the ores to the mill or stockpiles by Dodge was merely incidental to this primary function. The removal of ores being the primary service to be performed by Dodge under the agreement, it is not consistent with such purpose to conclude that in performing the agreement Dodge was engaged in the business of transporting property for hire.

III.

THE TERM "POINT" AS USED IN THE STATUTE IS TO BE INTERPRETED IN ACCORDANCE WITH ITS USUAL, ORDINARY AND ACCEPTED MEANING.

To be taxable, the transportation referred to in the statute must be from one point in the United States to another. Although the Treasury Department has defined all the other terms in the statute, it has neglected to define the phrase "from one point in the United States to another". In the absence of any definition by the Treasury Department and contained in the Regulations, the term "point" must be given its ordinary, usual and literal meaning. Such ordinary, usual and literal meaning was pointed out in the opening brief of appellant (Br. pp. 26-30). The term "point" is synonymous with "place" and by "place" we mean a geographical place or situation; a locality; or an "Area or portion of land marked off or regarded as marked off and separated from the rest as by occupancy, use or character". In the ordinary signification of the term, the Getchell Mine was a point or place, and being a point or place the point of origin and the point of destination of ores moved within the limits of such property were the same.

The case of

Charles M. Lyle v. United States, 76 Fed. Supp. 787 (N.D. Georgia),

cited on pages 27-28 of appellant's opening brief, has not been distinguished by the United States. This case squarely held that the movement of property by a carrier for hire within the limits of an airfield under

construction did not constitute transportation of property from one point in the United States to another within the meaning of section 3475(a). In the *Lyle* case there were points of origin and destination within the confines of a single limited area constituting one point or place. In that case a subcontractor was employed by a contractor engaged in grading and leveling an airfield, to receive earth from a grading shovel, and move the earth from the shovel to the dump or fill. The drivers of the trucks were employed and paid by the subcontractor, and the contractor was paid an hourly rate for the use of trucks and drivers. That case is, on its facts, no different from the case at bar, and the decision of the Court under those facts seems to have been approved by the Circuit Court of Appeals for the Second Circuit in

Bridge Auto Renting Corporation v. Pedrick,
174 Fed. (2d) 733 at page 738,

cited on page 29 of appellant's opening brief.

The appellant does not ask for any construction of the statute but simply asks that the words of the statute and the phrase "from one point in the United States to another" be given its ordinary, literal and accepted meaning. The United States, on the other hand, would have the Court give the word "point" a meaning other than that contained in the dictionary so as to denominate it "any dot in space". It is thus the United States, and not the appellant, that is asking that the statute be extended by implication.

As respects taxing statutes, in the absence of any ambiguity and when the statute is free from doubt,

the words used therein must be given their ordinary and accepted meaning but if there be any doubt they must be construed most strictly against the taxing authority. The appellee has not called to the attention of the Court any extraneous relevant aids to construction which would cast any doubt upon its meaning and, in the absence of such aids to construction, Congress meant what the words it used would ordinarily convey.

In

United States v. Merriam, 263 U.S. 179, 68 L. Ed. 240,

in which the Court was called upon to determine the meaning of the word "beneficiary", it was urged by the taxpayer, as it is here urged by the United States, that as a practical matter the substance, rather than the form in which the tax was imposed, should be considered. The Court said:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the *literal* meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer." (Italics ours).

The burden is upon the United States to bring the subject sought to be taxed within the letter of the

law and, in the absence of ambiguity, if it cannot do so the person or subject of taxation is free, however apparently he or it may be within the spirit of the law. An equitable construction of the statute may not be urged. The United States urges an equitable construction in that section 3475(a) of the Internal Revenue Code is claimed to be a revenue measure intended to raise money for war and, therefore, entitled to be given special consideration. The United States cites no authority for the proposition that a war revenue measure is to be interpreted differently or given a meaning more broad than a revenue act enacted in time of peace.

If there be any doubt whether Congress intended a movement of property solely on the premises of a commercial enterprise and incidental to the carrying on of that enterprise to be subject to the transportation tax, such doubt must, under applicable rules of construction, be resolved in favor of the taxpayer and against the United States. Thus in

Old Colony Railroad Company v. Commissioner of Internal Revenue, 284 U.S. 552 at 561,

it is said:

> "If there were doubt as to the connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer."

and in

White v. Aronson, 302 U.S. 16 at 20,

it is said:

> "Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. * * * 'Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them.'"

In

Gould v. Gould, 245 U.S. 151, 62 L. Ed. 211,

the Court said, at page 153 of 245 U.S.:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

IV.

CONCLUSION.

Looking solely to the findings of the Court, the following undisputed facts appear:

That the arrangement of Dodge with appellant called for the mining of ores by the use of power shovels by Dodge and the transportation of the ores from the mine to the mill. For both the mining and the transportation, Dodge was paid a flat sum. The movement of the ores, following their mining, took place entirely on the premises of the Getchell Mine except that part of the ores moved from the Granite

Creek Mine a distance of approximately one mile across a section owned by the United States. There is no finding that Dodge was, apart from its contract with Getchell, a carrier for hire or engaged in the business of transporting property for hire. Upon these findings by the lower Court, we believe we are justified in our conclusion that the performance of the agreement with Getchell did not constitute transportation of property from one point in the United States to another by a person engaged in the business of transporting property for hire within the meaning of section 3475(a) of the Internal Revenue Code.

Dated, Reno, Nevada,
January 13, 1950.

Respectfully submitted,
WM. WOODBURN,
WM. J. FORMAN,
WM. K. WOODBURN,
JOHN P. THATCHER,
Attorneys for Appellant.

No. 12330

United States
Court of Appeals
For the Ninth Circuit.

STANDARD INSURANCE COMPANY,
A Corporation,

Appellant,

vs.

MABLE E. WISTING,

Appellee.

Transcript of Record

Appeals from the District Court of the United States for the District of Oregon

FILED
OCT 28 1949
PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12330

United States
Court of Appeals
For the Ninth Circuit.

STANDARD INSURANCE COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland, Oregon,

Attorney for Appellee.

In the District Court of the United States
for the District of Oregon

No. Civ. 4285

MABEL E. WISTING,

Plaintiff,

vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon Corporation,

Defendant.

COMPLAINT

Plaintiff alleges:

I.

Plaintiff is a citizen of the State of California, and defendant is a corporation incorporated under the laws of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100 Dollars ($3,000.00).

II.

That on May 26, 1927, defendant, whose name was then Oregon Life Insurance Company, issued to Gustav H. Wisting, also known as George H. Wisting, a policy of life insurance wherein and whereby defendant promised to pay the sum of Five Thousand no/100 Dollars ($5,000.00) to the beneficiary of said policy upon due proof of the death of said Wisting while said policy was in force.

III.

That Gustav H. Wisting died January 18, 1947, and that at the time of his death plaintiff was the beneficiary of said policy. That said policy was in force at said time.

IV.

That during his lifetime Gustav H. Wisting performed all conditions precedent to continuing said policy in force. [1*]

V.

That due proof of death of Gustav H. Wisting has been furnished defendant at its home office at Portland, Oregon, and demand has been made upon defendant by plaintiff to pay to her said sum of Five Thousand and no/100 Dollars ($5,000.00). That defendants has refused to pay to plaintiff said sum of Five Thousand and no/100 Dollars ($5,000.00) or any other sum whatsoever. That One Thousand and no/100 Dollars ($1,000.00) is a reasonable sum to be allowed plaintiff as an attorney fee for the prosecution of this action.

Wherefore, plaintiff demands judgment against the defendant in the sum of Five Thousand and no/100 Dollars ($5,000.00) together with interest thereon at the rate of Six per cent (6%) per annum from January 18, 1947, and for the further sum of One Thousand and no/100 Dollars ($1,000.00) attorney fees, together with her costs.

/s/ DAVID SANDEBERG,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 13, 1948.

* Page numbering appearing at bottom of page of original certified Transcript of Record.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard regularly before this Court upon the motion of the defendant to amend the answer filed herein, and the Court being fully advised in the premises and good cause appearing therefor,

It Is Hereby Ordered that the defendant be granted leave to file the amended answer heretofore tendered and filed in the above-entitled action.

Dated this 24th day of January, 1949.

/s/ CLAUDE McCULLOCH,
Judge.

[Endorsed]: Filed Jan. 26, 1949.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now Defendant, Standard Insurance Company, improperly pleaded in plaintiff's Complaint as Standard Life Insurance Company, and for answer to Plaintiff's Complaint heretofore filed herein admits and denies as follows:

I.

Defendant admits each and every allegation contained in Paragraphs I and II of Plaintiff's Complaint.

II.

Defendant admits Gustav H. Wisting died on

or about January 18, 1947, denies each and every remaining allegation contained in Paragraph III of Plaintiff's Complaint.

III.

Defendant denies each and every allegation contained in Paragraph IV of Plaintiff's Complaint.

IV.

Defendant denies each and every allegation contained in Paragraph V of Plaintiff's Complaint save and except Defendant admits it refused to pay Plaintiff the sum of Five Thousand and no/100 Dollars ($5,000.00) or any other sum or amount whatsoever.

And for a first, further and separate answer and defense to plaintiff's Complaint, Defendant alleges as follows: [3]

I.

That the defendant issued to George H. Wisting under register date of May 21, 1927, a life insurance policy and contract of insurance bearing No. 34538 whereby the defendant promised to pay the sum of Five Thousand Dollars and no/100 ($5,000.00) to the beneficiary of said policy upon due proof of the death of said George H. Wisting while said policy was in force.

II.

Said policy of insurance was issued by the defendant in consideration of the payment by the insured of an initial premium of $64.05 and the advance payment of all future premiums upon said

policy; that said policy was modified by endorsement and the semi-annual premiums were modified so that a semi-annual premium became due on said policy on the 21st day of November, 1946, in the sum of $66.05.

III.

That by the terms of said contract of insurance the same became void and lapsed for the non-payment of premiums excepting only that a period of grace of one month, not less than thirty days, was allowed for the payment of every premium.

IV.

That on the 7th day of November, 1946, the defendant mailed to the insured policy holder, George H. Wisting, a notice in writing advising the said George H. Wisting that the semi-annual premium of said policy in the sum of $66.05 would be due on the 21st day of November, 1946, and that said notice was deposited in the United States Post Office at Portland, Oregon, with postage pre-paid and was addressed to the insured, George H. Wisting at his last known address namely, 3378 Tareco Drive, Los Angeles, 28, California.

V.

That the insured, George H. Wisting, failed to pay the said premium and that said premium never was paid and that the said policy of insurance lapsed upon the expiration of thirty days grace from and after the said premium due date of November 21, 1946.

VI.

That on or about the 8th day of January, 1947, the defendant notified the insured, George H. Wisting, that the said policy of insurance had lapsed and was no longer in force and effect.

And for a second, further and separate answer and defense to plaintiff's Complaint, defendant alleges as follows:

I.

That the insured, George H. Wisting, under the policy of insurance mentioned in plaintiff's Complaint, borrowed the full loan value on said insurance policy and exhausted all of the insured's reserve thereunder by a loan which was completed October 28, 1946; that by reason of pre-payment of interest a credit to the insured under the automatic loan provisions of the policy would have carried said insurance to November 25, 1946, but that no credit or reserve remained in favor of the insured beyond November 25, 1946; that the days of grace for payment of the premium, which was due on said policy November 21, 1946, expired and the reserve of said policy was used up and for that reason the said policy lapsed on December 21, 1946.

II.

That the total loan outstanding on said policy to the insured using all credits amounted to $1,402.42 on November 25, 1946; that the total cash value on said date was $1,402.36 and that if the plaintiff should have any claim against the defendant that the defendant is entitled to off-set against the same

the said loan in the sum of $1,402.42, together with interest thereon at the rate of 6% per annum from November 25, 1946.

Wherefore, defendant prays that Plaintiff's Complaint be dismissed; that the plaintiff take nothing thereby, and that the defendant recover its costs and disbursements from the plaintiff herein.

/s/ PAUL A. SAYRE,
WINFREE, McCULLOCH,
SHULER & SAYRE,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Service of the within Amended Answer is hereby accepted in Multnomah County, this 18th day of January, 1949.

/s/ DAVID SANDEBERG,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 24, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Deceased knew that he did not have to pay the interest on his policy loan until May 21, 1947. From his point of view, and in layman's thinking, the interest did not become an indebtedness until then. In the absence of notice to deceased, it would be unjust to permit the Company to put a different

interpretation on "indebtedness," for the purpose of lapsing the policy.

Findings and Conclusions in accord herewith may be submitted .

Dated April 1, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 1, 1949. [4]

[Title of District Court and Cause.]

FINDINGS REQUESTED BY DEFENDANT

Upon motion of the defendant and in addition to other Findings of Fact and Conclusions of Law, the Court makes the following

Findings of Fact

I.

The automatic loan section of the life insurance policy described in plaintiff's complaint provides:

. . . "This policy shall remain in force and effect as long as the increasing loan value hereof . . . is sufficient to pay for pro rata insurance for one additional day, on a quarterly premium basis, and to secure all existing indebtedness hereon, with interest."

II.

Computation of the use of the automatic loan provided in the policy to the dates of November 25, 1946 and November 26, 1946 is as follows:

"November 25, 1946:

Cash Value as of 5-21-47	$1,446.00
Cash Value as of 5-21-46	1,356.00
Increase in Cash Value 5-21-46 to 5-21-47	90.00
Increase in Cash Value 5-21-46 to 11-25-46 inclusive, 189 days: 189 x 90.00 / 365	46.60
Cash Value as of 5-21-46	1,356.00
Cash Value as of 11-25-46	$1,402.60
Policy Loan taken out 10-28-46	$1,394.00
Premium to cover period 11-21-46 to 11-25-46 inclusive, 5 days: 5 x 33.64 / 91.25	1.84
Interest on loan from 10-28-46 to 11-25-46 inclusive, 29 days: 29 x.06 x 1,394.00 / 365	6.65
Interest on above premium from 11-21-46 to 11-25-46 inclusive, 5 days: 5 x .06 x 1.84 / 365	
[5]	$1,402.49

November 26, 1946:

Cash Value as of 5-21-47	$1,446.00
Cash Value as of 5-21-46	1,356.00
Increase in Cash Value 5-21-46 to 5-21-47	90.00
Increase in Cash Value 5-21-46 to 11-26-46 inclusive, 190 days: 190 x 90.00 / 365	46.85

Cash Value as of 5-21-46.....	1,356.00
Cash Value as of 11-26-46.....	$1,402.85
Policy Loan taken out 10-28-46.....	$1,394.00
Premium to cover period 11-21-46 to 11-26-46 inclusive, 6 days: 6 x 33.64.....	2.21
91.25	
Interest on loan from 10-28-46 to 11-26-46 inclusive, 30 days: 30 x .06 x 1,394.00....	6.87
365	
Interest on above premium from 11-21-46 to 11-26-46 inclusive, 6 days: 6 x .06 x 2.21	——
365	
	$1,403.08

III.

Computation under the terms of the automatic loan provision of the policy as of the date of death is as follows:

"Computation showing effect of paying premium to and including January 17, 1947 by automatic loan.

Cash Value as of 5-21-47.....	$1,446.00
Cash Value as of 5-21-46.....	1,356.00
Increase in Cash Value 5-21-46 to 5-21-47	90.00
Increase in Cash Value 5-21-46 to 1-17-47 inclusive, 242 days: 242 x 90.00.....	59.67
365	
Cash Value as of 5-21-46.....	1,356.00
Cash Value as of 1-17-47.....	$1,415.67

Policy Loan taken out 10-28-46.....	$1,394.00
Premiums to cover period 11-21-46 to 1-17-47 inclusive, 58 days: 58 x 33.64..... / 91.25	21.38
Interest on loan from 10-28-46 to 1-17-47 inclusive, 82 days: 82 x .06 x 1,394.00.... / 365	18.79
Interest on above premium from 11-21-46 to 1-17-47 inclusive, 58 days: 58 x .06 x / 365	
21.38	.20
	$1,434.37

Computation showing effect of paying premium to and including January 18, 1947 by automatic loan:

Cash Value as of 5-21-47.....	$1,446.00
Cash Value as of 5-21-46.....	1,356.00
Increase in Cash Value 5-21-46 to 5-21-47	90.00
Increase in Cash Value 5-21-46 to 1-18-47 inclusive, 243 days: 243 x 90.00..... / 365	59.92
Cash Value as of 5-21-46.....	1,356.00
Cash Value as of 1-18-47.....	$1,415.92
Policy Loan taken out 10-28-46.....	$1,394.00
Premium to cover period 11-21-46 to 1-18-47 inclusive, 59 days: 59 x 33.64..... / 91.25	21.75

Interest on loan from 10-28-46 to 1-18-47 inclusive, 83 days: $\frac{83 \times .06 \times 1{,}394.00}{365}$ 19.02

Interest on above premium from 11-21-46 to 1-18-47 inclusive, 59 days: $\frac{59 \times .06 \times 21.75}{365}$ ..... .21

$1,434.98

Conclusions Of Law

I.

Based upon the foregoing Findings of Fact, the Court concludes that said policy of insurance lapsed on or before the 26th day of November, 1946, and was not in force and effect on January 18, 1947, the date of the death of the insured, George H. Wisting.

Dated this .... day of April, 1949.

.....

Judge.

WINFREE, McCULLOCH,
SHULER & SAYRE,
Attorneys for Defendant.

Due service of the within Requested Findings of Defendant is hereby accepted in Multnomah, County, Oregon, this — day of April, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for Defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 22, 1949. [5B]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW

The above entitled cause having come on regularly on the 4th day of February, 1949, for trial before the undersigned Judge of the above entilted Court sitting without a jury, the parties having respectively waived the right to insist upon a jury trial; the plaintiff appearing by and through her attorneys, David Sandeberg and Bardi G. Skulason, and the defendant appearing by its Secretary R. W. R. Calderwood and Paul A. Sayre, its attorney; opening statements were made by respective counsel in which opening statements it was stipulated and agreed by the respective parties that no question was raised by defendant as to proof of death, that plaintiff was the beneficiary of the insurance policy in question, that the true and correct name of defendant is Standard Insurance Company and not Standard Life Insurance Company and that no question was raised by defendant on account of the misnomer in the title and that should it become necessary the Court could determine a reasonable attorney fee to be allowed plaintiff for the prosecution of this action; after which evidence was introduced on behalf of plaintiff and defendant; that after the introduction of said evidence briefs were submitted by the attorneys for the respective parties and thereafter on the 4th day of March, 1949, oral argument [7] was made by the attorney for the respective parties and

upon completion of said oral argument on the 4th day of March, 1949, the Court took said cause under advisement and the Court having given full and due consideration to said cause and now being fully advised in the premises does now make the following:

Findings Of Fact

I.

That plaintiff is a citizen of the State of California.

II.

That defendant is a corporation incorporated under the laws of the State of Oregon and that the correct name of defendant is Standard Insurance Company and that defendant has waived any question concerning the misnomer of defendant in the title of this cause.

III.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

IV.

That on May 26, 1927, defendant whose name was then Oregon Life Insurance Company issued to Gustav H. Wisting, also known as George H. Wisting, a policy of life insurance wherein and whereby defendant promised to pay to the beneficiary of said policy upon due proof of the death of said Wisting while said policy was in force, the sum of $5,000.00.

V.

That Gustav H. Wisting, also known as George H. Wisting, died January 18, 1947, and that at the time of his death plaintiff was the beneficiary of said policy. [7A]

VI.

That during his lifetime Gustav H. Wisting, also known as George H. Wisting, performed all conditions precedent to continuing said policy in force; that due proof of death of Gustav H. Wisting has been furnished defendant at its home office in Portland, Oregon, defendant having stipulated in its opening statement that no question was raised in this regard.

VII.

That demand has been made upon defendant by plaintiff that payment be made to her under this policy.

VIII.

That defendant has refused to pay to plaintiff any sum whatsoever; that $750.00 is a reasonable sum to be allowed plaintiff as attorney fee for the prosecution of this action. That the number of life insurance policy and the contract of insurance is numbered 34538, and that said policy bears register date, May 21, 1927.

IX.

That the anniversary of said policy occurred on the 21st day of May of each year.

X.

That during his lifetime the deceased paid semi-annual premiums upon said policy as required there-

by for a period of nineteen and one-half (19½) years; that the last premium payment made by the deceased was made on the 19th day of June, 1946, and was a semi-annual premium on said policy which was due on May 21, 1946, and was made during the grace period therefor.

XI.

That on the second day of March, 1937, the [7B] deceased borrowed $600.00 upon the policy; that interest on this loan was paid each year on the anniversary of the policy when it became due according to the records of the Company; that interest on this loan was never collected in advance but was always paid on the anniversary of the policy.

XII.

That on the 28th day of October, 1946 defendant made an additional loan to the deceased upon said policy. That said loan was in the amount of $1,394.00; that from the proceeds of said loan the previous loan of $600.00 was deducted as well as interest at the rate of 6% upon said loan from May 21, 1946, until October 28, 1946, so that on the 28th day of October, 1946, according to the records of the defendant, there was an indebtedness against the policy in the sum of $1,394.00.

XIII.

That immediately prior to obtaining said loan of $1,394.00 from which the principal and interest to date upon the old loan was deducted, plaintiff

executed a policy loan agreement in favor of defendant. That said policy loan agreement provided that interest would be due upon said new loan on the next premium anniversary date of the policy which was May 21, 1947.

XIV.

That on or about the 7th day of November, 1946, defendant mailed to the deceased a premium notice for the semi-annual premium due upon said policy on November 21, 1946. [7C] That said notice set forth only the semi-high annual premium due upon said date and contained no mention whatsoever of any interest due upon the loan. That said premium was never paid.

XV.

That thereafter upon the 24th day of November, 1946, and during the grace period of 30 days upon said premium, the deceased suffered a severe heart attack from which he died on the 18th day of January, 1947.

XVI.

That said policy contained an automatic premium loan provision which provided that if a premium was not paid when due or within the days of grace thereafter the policy would remain in effect as long as the increasing loan value would pay for pro rata insurance for one additional day, on a quarterly premium basis and "to secure all existing indebtedness hereon, with interest."

XVII.

That under said automatic loan provision the in-

creasing loan value of said policy would have continued said policy in force until the 23rd day of January, 1947.

XX.

That there is no provision in said policy permitting defendant to charge accrued interest upon the loan against said policy before said interest became due.

XXI.

That defendant attempted to charge accured interest on said loan against the policy before it became due.

XXII.

That the charge of said accured interest before it became due would have hastened and lapsed the policy prior to the death of the assured.

XXIII.

That no notice of charge of accured interest before it became due was given to the assured.

XXIV.

That defendant did nothing to attempt to foreclose the policy under the provisions of the loan agreement particuarly paragraph III. That defendant did not attempt to charge accrued interest thereunder and did not send notice of forfeiture thereunder.

XXVI.

That the letter of January 8, 1947, directed to the assured by the Company was not a letter declaring a forfeiture of the policy under paragraph III. of the loan agreement. [7F]

XXVII.

That the loan against the policy bore interest at the rate of 6%.

XXVIII.

That said deceased knew that he did not have to pay interest on his policy loan until May 21, 1947. From his point of view, and in layman's thinking, the interest did not become an indebtedness until then. In the absence of notice to deceased, it would be unjust to permit the Company to put a different interpretation on "indebtedness," for the purpose of lapsing the policy.

Now, therefore, based upon the foregoing Findings of Fact the Court now draws the following:

Conclusion Of Law

I.

That defendant, whose true name is Standard Insurance Company, an Oregon corporation, is and has been indebted to plaintiff in the full sum of $5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid, less the sum of $1,394.00 together with interest thereon from the 28th day of October, 1946, until paid.

II.

That plaintiff is entitled to recover from defendant, correctly named Standard Insurance Company, said sum and her costs and disbursements herein incurred.

III.

That plaintiff is entitled to recover of and from

defendant, Standard Insurance Company, an Oregon corporation, attorney fees in the sum of $750.00. [7G]

IV.

That plaintiff is entitled to judgment against defendant, and judgment shall forthwith be entered in favor of plaintiff against defendant in the full sum of $5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid, less the sum of $1,394.00 together with interest thereon at the rate of 6% per annum from October 28, 1946, until payment of this judgment and for the additional sum of $750.00 attorney fees together with plaintiff's costs and disbursements herein incurred.

Dated this 18th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Findings of Fact, Conclusions of Law submitted by plaintiff, by copy as prescribed by law is hereby admitted, at Portland, Oregon, this 15th day of April, 1949.

/s/ PAUL A. SAYRE,
Attorney for Defendant.

[Endorsed]: Filed May 18, 1949. [7H]

[Title of District Court and Cause.]

OBJECTIONS TO AND MOTION TO AMEND FINDINGS OF FACT

Now comes the defendant in the above-entitled cause and in response to plaintiff's request for Findings of Fact and Conclusions of Law objects to the Findings, and, using the plaintiff's numbering of Findings, moves to amend and specifies objections as follows:

Finding No. IV.

Finding No. IV should be amended by adding thereto "subject to all of the conditions of the said policy."

Finding No. V.

Approves of the Finding that George H. Wisting died January 18, 1947, but objects to the balance of the Finding as a conclusion of law and not a finding of fact.

Finding No. VI.

Objects to the Finding that all conditions precedent to continuing said policy in force have been performed for the reason that the same is a conclusion of law.

Finding No. VIII.

Defendant objects to this Finding upon the ground that no attorney's fee is assessable herein.

Finding No. XI.

Defendant objects to Finding No. XI for the reason that the same is irrelevant and immaterial and has no bearing upon the issues of this case.

Finding No. XII.

The defendant objects to Finding No. XII on the ground that the same is immaterial excepting as to the latter part, namely "that on the 28th day of October, 1946, there was an indebtedness against the policy in the sum of $1394.00."

Finding No. XIII.

The defendant objects to the last sentence in Finding No. XIII on the ground that the same is irrelevant and immaterial.

Finding No. XV.

The defendant objects to Finding No. XV for the reason that the same is irrelevant and immaterial and not in support of the decision in this case, and for the further reason that there has been no proof of disability in accordance with the terms and conditions of the said life insurance policy and a finding upon such matter is not warranted by the evidence in this cause.

Finding No. XVI.

The defendant objects to Finding No. XVI upon the basis that the same is inaccurate and that the Finding is not in accord with the automatic loan provision of the policy more particularly designated as paragraph VII in said policy.

Finding No. XVII.

Defendant objects to Finding No. XVII upon the ground that the said Finding is not supported

by the evidence and that the same should be in accord with the Findings submitted by the defendant.

Finding No. XVIII.

The Defendant objects to Finding No. XVIII for the reason that the same is inaccurate, not according to the evidence and in conflict with the provisions of the automatic premium loan provision of the said insurance policy, which specifically provides for an automatic loan to pay the premium "provided that the loan value hereon shall exceed the amount of any premium then unpaid and of any indebtedness of the insured to the company," and in conflict with the further provision of said automatic premium loan clause in that said clause provides that the said insurance shall remain in force as long as the loan value "is sufficient to pay for pro-rata insurance for one additional day on a quarterly premium basis and to secure all existing indebtedness hereon with interest."

Finding No. XIX.

Defendant objects to Finding No. XIX upon the ground that there is no evidence to support the said finding and that the said finding is directly contrary to evidence submitted by the defendant.

Finding No. XX.

Defendant objects to Finding No. XX upon the ground that the same is contrary to evidence and in conflict with the provisions of the said insurance policy.

Finding No. XXI.

Defendants objects to Finding No. XXI on the ground that the same is contrary to the evidence, that the evidence shows that no interest was charged prior to the due date, except when a loan was made at which time the provisions of the policy were followed by deducting interest to the date of the loan.

Finding No. XXIII.

Defendant objects to Finding No. XXIII for the reason that the same is irrelevant and immaterial and that the policy was not lapsed by foreclosure of the loan but for non-payment of premium.

Finding No. XXIV.

Defendant objects to Finding No. XXIV for the reason that said policy was not forfeited for non-payment of loan but for non-payment of premium and that the said Finding is irrelevant and immaterial.

Finding No. XXV.

Defendant objects to Finding No. XXV upon the same grounds and for the same reasons as set forth in Findings XXIII and XXIV.

Finding No. XXVI.

Defendant objects to Finding No. XXVI upon the same grounds and for the same reasons as set forth in Findings XXIII and XXIV.

Finding No. XXVIII

Defendant objects to Finding No. XXVIII upon

the ground that the same is irrelevant and immaterial and a conclusion of law.

Conclusions of Law

The defendant objects to the conclusions of law submitted by plaintiff upon the ground and for the reason that the same are not supported by the evidence and the findings.

The defendant further moves the Court for additional Findings of Fact and Conclusions of Law as submitted herewith and at the argument of this motion will contend that the said policy of insurance lapsed as set forth in said Findings, and that under the terms of the policy interest upon indebtedness accrued day by day and reduced the reserve of said policy so that an automatic premium loan would not carry said policy to the date of death, and that at the argument of this motion the defendant will cite Reynolds v. Northwestern Mutual Life Insurance Company, 10 N.E. 2nd 70, and other cases in support thereof.

Dated this 21 day of April, 1949.

/s/ PAUL A. SAYRE,
Attorney for Defendant.

Due service of the within Objections to and Motion to Amend Findings of Fact is hereby accepted in Multnomah County, Oregon, this .... day of April, 1949, by receiving a copy thereof, duly certi-

fied to as such by Paul A. Sayre, of attorneys for Defendant.

/s/ DAVID SANDEBERG—R,
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 22, 1949.

[Title of District Court and Cause.]

MEMORANDUM ON ENTRY OF JUDGMENT

There are elements of fair dealing and notice in this case that I have hesitated to comment on until now.

For 19 years the deceased paid premiums on this policy, and now the Company seeks to defeat recovery on a technical ground, which involves but $66.00. The Company says it must act in accord with conventional practices of other companies.

No wonder the life insurance companies in this country are threatened with Government regulation. Having accumulated billions of dollars in reserves in hardly more than a generation, out of the earnings of young and old, the companies cannot find a way to extend just the ordinary amenities of seller to customer.

In the present case, the insured was in his last illness and the insurance company had his address. He had two other policies with the Company. Could one of its executives take the time to call or write the stricken man's wife to inform her that the grace

period was running and that a small payment stood between her and realizing on insurance of 19 years standing? No. The notice she got was that the insurance had lapsed and "could they be of further assistance?"

Because these are the facts of the case, I am giving the policy a strict construction against the Company and in favor of the widow—even though I have been told other courts have held on the point at issue to the contrary.

Dated May 18, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 18, 1949.

In the District Court of the United States
for the District of Oregon

No. Civ. 4285

MABEL E. WISTING,

Plaintiff,

vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon Corporation,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly on the 4th day of February, 1949, for trial be-

fore the Honorable Claude McColloch, Judge of the above-entitled Court in Portland, Oregon, sitting without a jury, the parties having respectively waived the right to a jury trial; the plaintiff appearing by and through her attorneys, Bardi G. Skulason and David Sandeberg, and defendant appearing by its Secretary, R. W. R. Calderwood, and Paul R. Sayre, its attorney; the Court having heard the evidence, considered the briefs and listened to the argument of the respective attorneys, and having heretofore made and filed its findings of fact and conclusions of law wherein the Court finds and concludes that the plaintiff is entitled to judgment against the defendant in the full sum of $5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid less the sum of $1394.00 together with interest thereon at the rate of 6% per annum from October 28, 1946, until payment of this judgment and for the additional sum of $750.00 attorneys' fees together with plaintiff's costs and disbursements herein incurred.

Now, Therefore, It Is Ordered and Adjudged that plaintiff have and recover of and from defendant, Standard Insurance Company, an Oregon corporation, misnamed in the title hereof as Standard Life Insurance Company, an Oregon corporation, the full sum of $5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid less the sum of $1394.00 together with interest thereon at the rate

of 6% per annum from October 28, 1946, until payment of this judgment and for the further sum of $750.00 attorney's fees together with plaintiff's costs and disbursements herein incurred taxed at $52.41.

Dated this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPLICATION TO TAX COSTS

To defendant, Standard Insurance Company, misnamed Standard Life Insurance Company, and Paul A. Sayre, its attorney:

You, and each of you, are hereby notified that the plaintiff will apply to the Clerk of the above-entitled Court to tax costs on June 3, 1949, at 10:00 a.m.

/s/ DAVID SANDEBERG,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Notice of Application to Tax Costs together with Statement of Disbursements by copy as prescribed by law is hereby

admitted, at Portland, Oregon, this 2nd day of June, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE,
By /s/ HOWARD A. RANKIN,
Of Attorneys for Defendant.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

STATEMENT

Statement of Disbursements claimed by the plaintiff in the above-entitled cause, viz:

Clerk's Fees	$15.00
Marshal's Fees	2.06
Attorney's Fees	20.00
Attorney's Fees for taking Depositions at $2.50 each	2.50
Depositions	12.85
Costs taxed at	$52.41

Date, June 4, 1949.

/s/ LOWELL MUNDORFF,
Clerk.
By /s/ P. L. BUCK,
Chief Deputy.

District of Oregon—ss.

I, David Sandeberg, being duly sworn, on my oath say that I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said plaintiff is entitled to recover the same from the defendant as I verily believe.

/s/ DAVID SANDEBERG.

Subscribed and Sworn to before me this .... day of June, 1949.

....,
Clerk.

By ....,
Deputy Clerk.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Standard Insurance Company, an Oregon corporation, the defendant in the above-entitled action, hereby appeals to The United States Circuit Court of Appeals, for the Ninth Circuit, from the final judgment of this Court made and entered in this action on the 26th day of May, 1949.

June 22, 1949.

/s/ PAUL A. SAYRE,
WINFREE, McCULLOCH,
SHULER & SAYRE,
Attorneys for Appellant, Standard Insurance Company.

State of Oregon,
County of Multnomah—ss.

Due service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this .... day of June, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for Defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the above-named Mabel E. Wisting, plaintiff, recovered a Judgment against the above-named Standard Insurance Company, an Oregon corporation, defendant, for the sum of Five Thousand Dollars ($5,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 18th day of January, 1947, less the sum of Thirteen Hundred Ninety-four Dollars ($1394.00), with interest thereon at the rate of six per cent (6%) per

annum from October 28, 1946, and for the further sum of Seven Hundred Fifty Dollars ($750.00) attorneys' fees, with plaintiff's costs and disbursements herein incurred and taxed at Fifty-two and 41/100 Dollars ($52.41) in a civil action, tried before the Honorable Claude McColloch, United States District Judge in and for this District and State, said Judgment having been rendered on the 26th day of May, 1949; and

Whereas, the appellant is desirous of staying the execution of said judgment so appealed from:

Now, Therefore, we, Standard Insurance Company, an Oregon corporation, appellant, and Peerless Casualty Company, a New Hampshire Corporation, duly licensed to do a general surety business in the State of Oregon, as surety, do hereby jointly and severally undertake and promise, on the part of the appellant, that if for any reason said appeal is dismissed or said Judgment is affirmed, said appellant will satisfy said Judgment in full, with costs, interest and damages for delay, and that if said Judgment is modified, said appellant will satisfy such modification of Judgment in full, with such costs, interest and damages for delay as the Appellate Court may adjudge and award against said appellant on appeal.

Dated this 22nd day of June, 1949.

STANDARD INSURANCE
COMPANY.

By /s/ R. W. R. CALDERWOOD,
Appellant.

PEERLESS CASUALTY
COMPANY.

By /s/ BEULAH SPALDING,
Attorney in Fact, (Surety).

Countersigned:

DOOLY & CO.

By /s/ R. M. DOOLY,
Partner, Resident Agent.

WINFREE, McCULLOCH,
SHULER & SAYRE,

Attorneys for Appellant, 1016 Spalding Building, Portland 4, Oregon.

Approved:

JAMES ALGER FEE,
U. S. District Judge.

State of Oregon,
County of Multnomah—ss.

Due service of the within Supersedeas Bond on Appeal is hereby accepted in Multnomah County, Oregon, this .... day of June, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for Defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD ON APPEAL

Upon Ex Parte motion of the defendant supported by stipulation of the parties, it is hereby ..

Considered and Ordered that the time within which to file and docket the record on appeal of the above cause to the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to and including the 1st day of September, 1949.

Dated at Portland, Oregon, this 28th day of July, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL

Defendant-appellant having filed its Notice of Appeal from Judgment of this Court to the United States Court of Appeals for the Ninth Circuit and having designated portions of the record herein to be contained in the record on appeal hereby files its statement of points on which it intends to rely upon appeal as follows:

I.

The Court erred in finding:

(a) That the insured, Gustav H. Wisting also known as George H. Wisting, performed all conditions precedent to continuing the life insurance policy in question in force until the date of the death of the insured, namely, January 18, 1947;

(b) In failing to find that the said policy lapsed for non-payment of premium upon the expiration of thirty (30) days of grace allowed by the policy, namely, on December 21, 1946.

II.

The Court erred in finding that the policy of life insurance in question was kept in force until the date of the death of the insured by virtue of an automatic loan under the terms of the policy, and in making the following specific findings in regard thereto:

(a) In finding that there was any loan value in said policy of a sufficient amount that an automatic loan must be made to keep said policy in force until January 18, 1947, the date of the death of the insured, or to January 23, 1947, or to any date subsequent to November 26, 1946;

(b) In finding that the loan value of said policy increased by earnings which accrued from day to day to the date of death but that interest on indebtedness did not accrue day by day to the date of death and did not become indebtedness decreasing the loan value.

III.

The Court erred in that contrary to law and contrary to the facts adduced at the trial of this cause, it gave judgment to the plaintiff for Five Thousand Dollars ($5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1947, until paid, less the sum of One Thousand Three Hundred Ninety-four Dollars ($1,394.00) together with interest thereon at the rate of six per cent (6%) per annum from October 28, 1946, until payment of the judgment, and in giving judgment for the further sum of Seven Hundred Fifty Dollars ($750.00) attorney's fees, together with plaintiff's costs and disbursements.

Dated this 30th day of July, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE.
By /s/ PAUL A. SAYRE,
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

Due service of the within Statement of Points upon which Appellant will Rely on Appeal is hereby accepted in Multnomah County, Oregon, this 30th day of July, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of attorneys for defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 1, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD ON APPEAL PURSUANT TO RULE 75(a)

Comes now the defendant-appellant and designates the following portions of the record, proceedings, and evidence in the above-entitled cause to be contained in the record on appeal of said cause:

1. Original Complaint, filed November 13, 1948.
2. Order granting leave to file Amended Answer, dated January 24, 1949, and filed January 26, 1949.
3. Amended Answer, filed January 24, 1949.
4. Memorandum of Decision, dated April 1, 1949, and filed April 1, 1949.
5. Findings of Fact and Conclusions of Law, requested by plaintiff.
6. Objections to and motion to amend Findings of Fact, filed April 22, 1949.
7. Findings of Fact and Conclusions of Law, requested by defendant, filed April 22, 1949.
8. Findings of Fact and Conclusions of Law, made, entered and filed by the Court on May 18, 1949.
9. Memorandum on entry of Judgment dated May 18, 1949, and filed May 18, 1949.
10. Judgment, filed May 26, 1949.
11. Cost Bill of Plaintiff, filed June 3, 1949.
12. Notice of Appeal, filed June 23, 1949.
13. Supersedeas Bond on Appeal, filed June 23, 1949.
14. Reporter's transcript of proceedings and

evidence certified June 16, 1949, and all exhibits introduced by plaintiff or defendant during the trial of this cause.

15. Order extending time to docket record on appeal entered July 28, 1949.

16. Statement of points upon which appellant will rely on appeal.

17. Designation of portions of record on appeal pursuant to Rule 75(a).

18. Order to forward all original exhibits.

Dated this 29th day of July, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE.
By /s/ PAUL A. SAYRE.

State of Oregon,
County of Multnomah—ss.

Due service of the within Designation of Portions of Record on Appeal Pursuant to Rule 75(a) is hereby accepted in Multnomah County, City of Portland, Oregon, this 1st day of August, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for defendant-appellant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 1, 1949.

[Title of District Court and Cause.]

ORDER TO FORWARD ORIGINAL EXHIBITS

Upon motion of defendant-appellant, it is hereby Considered and Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit in connection with the appeal of the above-entitled cause, all of the original exhibits in accordance with the usual practice of this Court in regard to the safekeeping for transportation of original exhibits.

Dated at Portland, Oregon, this 2nd day of August, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Aug. 2, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto, by and through their respective attorneys that the record on appeal in the above-entitled case be corrected so as to conform to the truth in the following particulars, to-wit: That the transcript of proceedings be corrected as follows:

1. That on page seven thereof in the second line of the third complete paragraph on said page, the word made be substituted for the word unpaid.

2. That on page fourteen thereof in the fourth line of the eighth complete paragraph on said page, the word the be substituted for the word they.

3. That on page eighteen thereof in the third line of the first complete paragraph on said page, the word November be substituted for the word December.

4. That on page twenty-three thereof in the fourth line of the first complete paragraph on said page, the numeral 7 be changed to numeral 4.

5. That on page thirty-one thereof in the fourth line of the first complete paragraph on said page, the numeral 3 be changed to numeral 4.

6. That on page thirty-one thereof in the first line of the second complete paragraph on said page, the numeral 3 be changed to numeral 4.

[Endorsed]: Filed Aug. 9, 1949.

[Title of District Court and Cause.]

PLAINTIFF-APPELLEE'S DESIGNATION OF PORTIONS OF RECORD ON APPEAL PURSUANT TO RULE 75(a)

Comes now the plaintiff-appellee and designates the following portions of the record, proceedings, and evidence in the above entitled cause to be contained in the record on appeal of said cause, said designation covering portions not designated by defendant-appellant:

1. That portion of plaintiff's memorandum containing the following sentence, which begins on line 17, page 3 thereof: "The statement attached to the check (Defendant's Exhibit 9) shows an item of $46.98 accrued interest; how this figure was reached is a mystery although the same figure appears on a pink slip in the file which refers to the premium notice of November 7, 1946 (Defendant's Exhibit 8)."

2. That portion of defendant's memorandum, which contains the following sentences beginning on line 28, page 3 thereof: "On page 3 line 18 of the memorandum a figure of $46.98 is shown and mention is made in line 19 that this figure is a mystery. Actually this $46.98 represents the amount of interest which would have been due on the next anniversary, May 21, 1947. It is equal to 6% interest on $1394.00 from October 28, 1946 to May 21, 1947, a period of 205 days. The calculation of this figure is as follows:

$$\frac{205 \times .06 \times \$1394.00}{365} = \$46.98$$

"This amount shows on the form so that records for collecting the proper amount of interest might be set up at the time the loan was made."

3. That portion of plaintiff's memorandum containing the following sentences, which begin on line 22, page 3 thereof: "The statement of the loan attached to the check also bears a figure of $83.64 denoted as interest charges; where this would come

from is likewise a mystery. On November 7, 1946, defendant sent to the deceased a premium notice (Defendant's Exhibit 4 and pink slip in file, Defendant's Exhibit 8)."

4. That portion of defendant's memorandum containing the following sentences, which begin on line 8, page 4 thereof: "On page 3 line 23, of the memorandum a figure of $83.64 is shown which is again referred to as a mystery. This amount represents 6% of the $1394.00 which is a year's interest on the amount of the loan. It represents the amount of the interest which would have been charged each year beginning May 21, 1947 as long as the loan continued at $1394.00. The reason it appeared on the statement of loan was for the purpose of setting up records for collection of future interest."

5. Stipulation of parties to correct record on appeal.

6. Order correcting record on appeal.

7. This supplemental designation.

Dated this 8th day of August, 1949.

/s/ DAVID SANDEBERG,
Of attorneys for plaintiff-appellee.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing plaintiff-appellee's designation of portions of record on appeal pursuant to rule 75(a) by copy as prescribed by law

is hereby admitted, at Portland, Oregon, this 8th day of August, 1949.

/s/ PAUL A. SAYRE,
Attorney for Defendant-Appellant.

[Endorsed]: Filed Aug. 9, 1949.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents *consiting* of complaint, order to amend answer, amended answer, memorandum decision, findings requested by defendant, defendant's objections to amend findings, findings of fact and conclusions of law, memorandum of Judge McColloch, judgment, notice to tax costs, cost bill, notice of appeal, bond, order extending time to docket record, statement of points, designation of record, order to forward exhibits, stipulation to correct transcript of proceedings, order to correct transcript of proceedings, designation of appellee, transcript of portion of plaintiff's brief, transcript of portion of defendant's brief, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in cause numbered Civil 4285, in which Mabel E. Wisting is plaintiff and appellee, and Standard Life Insurance Company, an Oregon corporation, is defendant and appellant; that the said record has been prepared by me in accordance with

the designation of contents of record on appeal filed by appellant, and additional designation filed by appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a duplicate transcript of proceedings dated February 4, 1949, filed in this office in this cause, together with exhibits 1 to 10 inclusive.

I further certify that the cost of preparing the foregoing transcript is $7.80, which includes the filing of notice of appeal, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 11th day of August, 1949.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

United States District Court, District of Oregon

Civil No. 4285

MABEL E. WISTING,

Plaintiff,

vs.

STANDARD LIFE INSURANCE COMPANY, an Oregon corporation,

Defendant.

Portland, Oregon, Friday, Feb. 4, 1949

Before: Honorable Claude McColloch, Judge.

Appearances:

DAVID SANDEBERG
B. G. SKULASON
Attorneys for Plaintiff.

PAUL A. SAYRE
WINFREE, McCULLOCH, SHULER & SAYRE
Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Sandeberg: The parties are ready at this time. I would like to ask that Mr. Skulason again be entered on the record as associate with me as one of the attorneys for the plaintiff.

If the Court please, there has been no pre-trial in this matter, and at the present time the parties are

before the [*1] Court on the complaint and amended answer of the defendant. It is a suit upon a life insurance policy which was issued to the husband of the plaintiff on May 26, 1927.

Paragraph I of the complaint, alleging jurisdiction, has been admitted, that plaintiff is a citizen of the State of California and defendant is an Oregon corporation.

The defendant's policy has likewise been admitted. The policy was in the sum of $5,000, and that has been admitted by the defendant.

Further than that, we allege in Paragraph III that the deceased died on January 18, 1947, and that at the time of his death the plaintiff was the beneficiary of said policy. Their answer denied generally all the allegations of that paragraph with the exception of the fact that the deceased died on January 18, 1947. However, since the taking of the deposition of Mr. Calderwood, and the policy likewise on its face shows that she was the beneficiary, I do not believe there is any dispute on that point at the present time?

Mr. Sayre: That is correct.

Mr. Sandeberg: The third paragraph also alleges as a conclusion of law that the policy was in force at the time of his death.

Paragraph IV of the complaint alleges that during his lifetime Gustav H. Wisting performed all conditions precedent to continuing said policy in force. The original answer in this [2] case merely

* Page numbering appearing at top of page of original Reporter's Transcript.

denied that paragraph generally, rather than specifically, with particularity in accordance with the rule, and, based on that, a motion for summary judgment was filed, which your Honor denied, and thereafter an amended answer was tendered and your Honor permitted the same to be filed.

Further than that, the complaint alleges that due proof of death of Gustav H. Wisting was furnished to the defendant at its home office at Portland, Oregon, and demand has been made upon defendant by plaintiff to pay to her the sum of $5,000. This was denied in the original answer. However, on the deposition of the secretary of the defendant thsi matter was admitted and I do not believe there is any question about due proof of death, is there, Mr. Sayre?

Mr. Sayre: There is no question but that proof of death was made in connection with other policies which the company had, and that there was a claim made on this policy, not in the regular form. We admit that. I think that is probably sufficient for the purposes of this case, that proof of death has been acknowledged and that they have made a claim—not in the usual manner, however.

Mr. Sandeberg: I might say, your Honor, that in connection with the deposition of Mr. Calderwood the following question was asked and he made the following answer:

"Q. And as far as this policy is concerned, there is no irregularity as far as due proof of death, [3] as far as your company is concerned, is there?

"A. Oh, no, no.

"Q. That isn't the reason for your non-payment? A. No.

"Q. You are not questioning that at all?

"A. No."

So, I understand the question of proof of death is not going to arise in this case or come up as a matter of defense.

They admit that they have refused to pay us the sum of $5,000 on this policy. They deny the amount of attorney's fees alleged and Mr. Sayre and I—I believe I am correct in stating this—have agreed that if it becomes necessary to fix attorney's fees the Court may determine them. Is that correct?

Mr. Sayre: Yes, that is satisfactory. It may be stipulated that if the plaintiff becomes entitled to attorney's fees herein the same may fixed by the Court.

Mr. Sandeberg: The amended answer of the defendant is the same as the original answer. However, the defendant sets forth a first, further and separate answer and a second further and separate answer.

In the first further and separate answer the defendant alleges the issuance of this policy on May 21, 1927, setting forth the number and the amount thereof. It further sets forth that the said policy of insurance was issued by the defendant in consideration of the payment by the insured of an initial [4] premium of $64.05 and the advance payment of all future premiums upon said policy; that

the said policy was modified by endorsement and the semi-annual premiums were modified so that a semi-annual premium became due on said policy on the 21st day of November, 1946, in the sum of $66.05. I believe the policy states on its face that the premiums were $55, or something like that. I am not certain as to this particular allegation but I am sure it will be cleared up as the testimony comes in.

Then they allege that by the terms of the contract the insurance policy became void and lapsed for non-payment of premiums excepting only that a period of grace of one month, not less than thirty days, was allowed for the payment of every premium.

Then they state that on the 7th day of November, 1946, the defendant mailed to the insured policy holder, at his last known address, a semi-annual premium notice, which notice I have here, calling for the payment of the sum of $66.05, stating that it would be due on the 21st day of November, 1946; that the said notice was deposited in the United States Post Office at Portland, Oregon, with postage prepaid, addressed to the insured at his last known address.

It is further alleged that he failed to pay that premium, that the premium never was paid and that the policy of insurance lapsed upon the expiration of thirty days' grace from and after the said premium due date of November 21, 1946. [5]

It must be borne in mind that he died January

18, 1947. They further allege that on or about the 8th day of January, 1947, they notified the insured that the said policy of insurance had lapsed and was no longer in force and effect. I have their original letter in which they so notified the insured.

For a second further and separate answer, they allege that the insured, under the policy of insurance, borrowed the full loan value on said insurance policy and exhausted all of the insured's reserve thereunder by a loan which was completed October 28, 1946; that is less than a month before the 21st of November when this premium became due and less than three months before he died.

They further state that by reason of the prepayment of interest a credit to the insured under the automatic loan provisions of the policy would have carried said insurance to November 25, 1946, and that the days of grace for payment of the premium, which was due on the policy November 21, 1946, expired and the reserve of said policy was used up and for that reason the said policy lapsed on December 21, 1946, less than a month before he died.

They further allege that the total loan outstanding on said policy to the insured, using all credits, amounted to $1,402.42 on November 25, 1946; that the total cash value on said date was $1,402.36; and that if the plaintiff should have [6] any claim against the defendant, the defendant is entitled to offset against the same the said loan in the sum of $1,402.42, together with interest thereon at the rate of 6 per cent per annum, and so forth.

As far as the plaintiff is concerned in this matter, obviously we do not have any direct knowledge of exactly what transpired, as far as that policy is concerned. The negotiations, if any, were carried on by Mr. Wisting, and under the circumstances we are insisting on strict proof. I understand that Mr. Sayre has brought all of his records on this matter into court and we will have a full and complete picture of the situation at the time of trial.

We intend to raise numerous questions. However, they will depend to some extent on what the evidence in this matter actually is. Up until now I have had to speculate as to what it might be. They will also depend to a substantial extent upon the position taken in this matter.

The policy, we contend, contains a mandatory provision that when a loan is made the premium for the balance of the year shall be deducted, and the company failed to do this, and we contend that under the circumstances they cannot take advantage of their own violation of the policy, and that this was mandatory.

I have been advised that Counsel is going to rely on the case—on a case in this Circuit to the effect that the provision requiring deduction of unpaid balance on the premium [7] from the loan on the policy is for the benefit of the company and can be waived, and that the company did waive it. I don't know whether that will be Counsel's contention or not, but I presume it will be. If such is his contention, I have an answer that I will wish to make to that, but, until such time as I am advised as to

what he will say in that regard, I am unable to state whether or not that will be my answer.

I might say that this policy is written under the laws of the State of Oregon and the policy contains provisions which are, in the main, like the statute. However, on this matter of policy loans and deductions, there is a slight difference between the terms of the policy and the terms of the statute, so my understanding of the rule in that case is that whichever is more favorable to the insured, in case there is any discrepancy between the policy provisions and the statute.

Further, we have a letter, signed by Mr. Calderwood, dated April 1, 1947, to Mrs. Wisting, offering his explanation of the reason for the turndown of the loan which, under the circumstances, we might want to introduce in evidence, and if Mr. Calderwood were called to the stand we might wish to ask some questions of him about it.

The Court: I thought there was a loan.

Mr. Sandeberg: This letter is dated April 1, 1947, to the widow, explaining the reason the policy was not paid.

The Court: You misstated yourself, then. [8]

Mr. Sandeberg: I am sorry, your Honor.

The Court: You said they "turned down the loan."

Mr. Sandeberg: Turned down the payment on the policy, is what I mean.

I understand Mr. Sayre has all the records with him. In addition thereto, we have stipulated that

the plaintiff, if present, would offer certain testimony in this matter, and there is a stipulation in connection therewith in the file which may be entered of record. The stipulation is subject, of course, to Counsel's right to object to the materiality of any matters therein contained. However, it is admitted that if she were present she would testify as stated and set forth in the stipulation. I believe that is correct, Mr. Sayre?

Mr. Sayre: That is right.

Mr. Sandeberg: At the time the deposition of Mr. Calderwood was taken, he was asked to identify the policy and examine it, and to state whether or not the policy was the same as shown by the company's records and, after checking his own record at the time the stipulation was submitted to him for signature, he apparently was agreeable that this was the policy, the company's policy, and that policy was attached to the deposition which is on file with the Clerk. That will also be a part of this record.

It so happens the stipulation reveals that the deceased suffered a heart attack on the 24th of November, 1946, three days after the premium became due and approximately twenty-seven days [9] before the days of grace expired; that he was told by a doctor that he would never work again and that he was in a state of despair, et cetera; and that in the opinion of Mrs. Wisting he was not mentally competent to think of an insurance policy; that the only letter that was ever received at the house from

the company was a letter of January 8, 1947, alleging that the policy had lapsed. That material will be important in connection with plaintiff's contentions in connection with the waiver of premium benefits on the policy.

I might say that if Counsel does contend that the provisions relative to deducting the unpaid premium from the face of the policy were not mandatory and that they were waived by the company, we will contend that, nevertheless, the loan value of the policy was sufficient so that under the automatic loan provisions of this policy the policy could have been carried beyond the date of death, and that the insurance policy, under the automatic loan provision, was in force at the time of his death.

I regret that under the circumstances, not having all the evidence before me, I am unable to state our position any more definitely at the present time, but I believe as Counsel states his position he will be able to further advise the Court.

Mr. Sayre: If the Court please, this insurance policy, which is the subject of litigation, was issued May 21, 1927, and the premiums were paid to and including that of May 21, 1946, [10] which was paid within the days of grace of June, 1946. The premiums under the policy were payable semi-annually. I wonder if the question of whether or not this policy was modified so that the premiums due on May 21st and on November 21st, 1946, amount to $66.05. Of course, we can go into this and prove the provisions of the policy but, since we have had

a pre-trial as to a few of these things, I am wondering if there is any dispute on that point. If there is, why, then, we will go ahead accordingly.

Mr. Sandeberg: Are you asking me at the present time?

Mr. Sayre: If I might ask Counsel, your Honor.

Mr. Sandeberg: The only purpose for it that would possibly dispute the amount of the premium would be for the purpose of showing what was required to carry the policy. I am not aware—the policy has not been in my possession—whether the additional riders, for which consideration was paid by the insured, are part of the policy, so as to carry it under the automatic loan provision before additional premiums would have been required or not, or if the original premium would have been sufficient.

Mr. Sayre: There are several things which have come up in the defense. One, of course, is that we claim that the premium due on November 21, 1946, was not paid, never was paid; that the entire loan value of the policy was used up; the loan which was closed on October 28, 1946, used up the entire loan value at [11] that time and, although by use of the prepaid interest and the balance it had under the automatic loan provision, it could have been carried to November 25, 1946, nevertheless, after that date, there was no reserve whatsoever on the ploicy, and that will be the contention of the defendant.

The premium notices, as I understand plaintiff

has admitted here, were sent and received by the insured; also, the letter of January 8, 1947, I believe Counsel for plaintiff has, in his statement, admitted was received, and that he has it here.

Therefore, as it stands, the defendant is insisting that the policy lapsed for non-payment of premium, that there was no reserve under the policy to carry it under the automatic loan provision. We claim that the premiums were not paid and the policy lapsed. If their contention is that under Paragraph V of the conditions of the policy that there was a mandatory provision for the company to deduct premiums to the end of the policy year—and I take it that is their contention—then that becomes a matter for your Honor.

The Court: Deducted from what?

Mr. Sayre: They apparently now are urging that the provisions in Paragraph V of the policy reading, "The company will deduct from such loan value any existing indebtedness hereon, and any unpaid balance of the premium for the current policy year . . ." was a mandatory provision and that the company should have [12] deducted from the loan which it made in October, 1946, a sufficient amount, sufficient premiums, to carry it up to May 21, 1947. I understand that is their contention now.

They do not urge it in their complaint, and we have pleaded non-payment of premiums. Our contention is that that terminates the policy. If they do make that contention here, and they are entitled to, of course we will claim two things: First, that

it would not apply and is not a mandatory provision and, after that, your Honor, we will cite a number of cases. If the Court wishes the cases now, I will give you the citation of the principal case which is 122 Fed. (2d) 395, also 137 A.L.R. 829. These cases have held that failure of the company to deduct is not a mandatory provision but for the protection of the company, and if they loaned the full amount she cannot complain that they should have loaned him less and deducted the premium. In other words, this case disputes that point.

As to the issues before the Court, it seems to me that the policy is admitted, that it was issued, that the premiums were paid on that policy up to May 21, 1946. I believe it is admitted that no premiums were paid from that time—therefore, that the premium due on November 21, 1946, was not paid—and that a loan for the full cash value of the policy was taken October 28, 1946.

Mr. Sandeberg: That is not admitted.

Mr. Sayre: That is not admitted? [13]

Mr. Sandeberg: No.

Mr. Sayre: Those being the issues, your Honor, then, it narrows really to a determination of this question of law as to the mandatory provisions of the policy, as I see it.

Perhaps we can get at this a little more readily if Mr. Calderwood, who is here, the secretary of the company, took the stand. Two or three things, I believe, should be called to the Court's attention.

The original complaint designated the defendant

as the Standard Life Insurance Company. We have corrected that by showing that the correct name is Standard Insurance Company. I trust that correction stands admitted.

Mr. Sandeberg: That is correct.

Mr. Sayre: We will put in evidence as to the amount of the loan. I think that will constitute our case.

I may say if they do urge that this is a mandatory provision, of course, we will have to urge that they waived that in borrowing or making the loan, although it is not pleaded in any way and we didn't know that at the time we filed our answer.

Mr. Sandeberg: I believe, your Honor, as far as the Griffin case is concerned, that the Court did state that the provision requiring that the unpaid balance of the premium for the current year should be deducted was not a mandatory provision; the company could waive it, and that they had a right to, if it was for their benefit. I would like to find out now if Mr. Sayre [14] does contend that that was waived.

Mr. Sayre: Naturally we contend that that was waived, if that is what they are relying upon.

Mr. Sandeberg: That is what I want to know now.

Mr. Sayre: We contend that it was waived.

Mr. Sandeberg: Very well. Under the circumstances I think I can state my position, now. The policy, on its face, provides that after three full years premium have been paid, the company, "at

any time while this policy is in force, will loan, upon the proper assignment of this policy and upon the sole security thereof, at a rate of interest which will not exceed six per centum per annum, a sum equal to, or at the option of the owner hereof, less than, the entire reserve hereon at the end of the then current policy year, including the reserve on any dividend additions then in force."

According to this policy the entire reserve at the end of the current policy year was the sum of $1,446, which appears on the face of the policy.

The policy further provides that: "The company will deduct from such loan value any existing indebtedness hereon," and that they will deduct any unpaid balance of the premium for the current policy year, and that they will collect interest in advance on the loan to the end of the current policy year.

The Griffin case holds that these provisions are for the benefit of the company and, when they do not choose to carry [15] through with them, that they have waived them. However, it is our contention in the case that if the company waives those deductions, that does not affect the loan value which is the reserve on the policy at the end of the current policy year.

Incidentally, your Honor, as far as this case is concerned, I believe the evidence will show that if the company had followed this provision of the policy in making the loan and had deducted the balance due on the premium for the current policy

year, that the insured would have got about $10 less than he got and his widow would have got about $4,000 more than she got, which was nothing.

It is going to be our contention that the fact that they have waived these deductions does not change the loan value. That loan value is provided for in the policy.

I believe that they are going to urge that a loan was made on this policy on October 28, 1946, in the sum of $1,394. I do not understand the answer when they speak of $1,402. In the letter from Mr. Calderwood to Mrs. Wisting he states the amount as $1,394. I don't know what the loan agreement provides as far as interest is concerned, but I believe it provides interest shall be paid at the next premium due date, which was November, and the company withheld five or six dollars to pay interest on the loan to November, and that at that time, November 21, 1946, there was indebtedness against the policy of approximately $1,400, with a loan value thereon of $1,446; the semi-annual [16] premium on the policy was $66. If there was $46, say, to the credit of this policy under the loan provision, it is going to be our contention that would have been ample to have kept this policy in effect for a period of less than sixty days, and I do not believe that there will be any disagreement on that score.

The automatic loan provision provides that if there is any reserve at the time of a lapse, that excess of the loan value over the indebtedness against the policy will be applied to the purchase of the

same kind of insurance the man has until it is exhausted, and at any time while the policy is in force, under the succeeding paragraphs, the insured may resume payment of the premiums. We are going to contend under that provision that the policy could have been carried. I am mindful of the fact that that question was raised in the Griffin case and the Court said it did not apply by virtue of a provision in the policy which does not exist in this policy.

I will further state to the Court at this time that they have before them, I believe, a loan agreement which Mr. Wisting signed. I am not objecting to his signature, but I believe that when the correspondence in connection with that loan agreement is before the Court, and the loan agreement itself, that it will be found that the company did not properly foreclose this loan against the policy. I believe the loan agreement will show that they were required to give notice of the foreclosure of this loan to the insured, and that that notice was required [17] before they could foreclose this loan on the policy.

It should be borne in mind, your Honor, that the insured was totally and permanently disabled from the 24th of November, during the period of the days of grace, and most certainly, had the company sent a notice at that time, the widow would have received it and certainly would have done something about paying up this loan on the policy.

I would like, as far as the evidence of the plaintiff in this matter is concerned, to introduce the

deposition of Mr. Calderwood, together with the policy itself, and as to the other matters, I believe I will first have to hear what Mr. Calderwood has to say.

Mr. Sayre: If the Court please, are we arguing this case at this time?

Mr. Sandeberg: No. I was merely telling the Court what I was going to contend.

Mr. Sayre: My contention is that the insured waived the provisions of deducting the premiums to the end of the policy year, and I believe Counsel for the plaintiff is mistaken in assuming the defendant company waived something. The insured waived the mandatory provision of the policy, if it was such. There was no requirement that they be deducted.

I may go further, since we are assuming—I want to go into this matter later on. In due time I want to be heard on these matters, but I think probably we should go ahead and [18] try the case first.

The Court: You are offering two things?

Mr. Sandeberg: I am offering the deposition and the policy. I believe at the present time that is all, although, in the light of Mr. Calderwood's testimony, I may have to ask leave to introduce other matters.

I want to state this: I asked Counsel specifically whether he was following the Griffin case, that such matters, that such provisions, were for the benefit of the company and the company could waive them, and my understanding was that Counsel said the

company could waive them. I do not like to transfer horses in midstream, but I asked Counsel if it was his contention the company waived, and he said that was his contention. Unless the Court excuses him from that contention, I want him held to it.

Mr. Sayre: If the Court please, I would like to have that matter clear. In the argument there was a question whether or not this man, in accepting the loan, in receiving the notice and statement, had waived the requirements, if there were such, under the policy that the premium be deducted from his loan. I will urge, if that is their contention, that in accepting the loan he waived the provisions of the policy. I would like that clear. I am not receding from the position in the Griffin case, but I would like that made clear to the Court.

The Court: Let us follow the usual course. He is offering [19] two exhibits.

Mr. Sandeberg: I am offering first the stipulation and the policy as well as the deposition of Mr. Calderwood, and the premium receipt. I have handed to the Clerk everything that I have on this matter, although I understand that Mr. Sayre has brought all his records with him and there may be certain things in his records that we would like to have marked at this time.

Mr. Sayre: May I see the exhibits, if they are to be introduced?

Mr. Sandeberg: What I was doing was asking that they be identified in the pre-trial procedure.

Mr. Sayre: Are any of these exhibits to be of-

fered in evidence now? At the time they are offered in evidence I will have objections to certain of them on certain grounds.

The Court: Offer them one at a time, Mr. Sandeberg.

Mr. Sandeberg: I offer what has been marked No. 2 for Identification, being the policy.

Mr. Sayre: No objection.

The Court: Received.

(Policy of Insurance No. 34538, Gustav H. Wisting, Amount $5,000, thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Sandeberg: I ask to have introduced Plaintiff's Identification No. 3, being the receipt covering payment of [20] premium, dated June 19, 1946, for the premium due May 21, 1946.

Mr. Sayre: No objection.

The Court: Admitted.

(Receipt for premium, in amount $68.75, dated June 19, 1946, thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Sandeberg: I now offer in evidence as Plaintiff's Exhibit No. 1 the stipulation, being a stipulation as to the testimony of the plaintiff, were she present. I understand Mr. Sayre has no objection.

Mr. Sayre: We are presently willing to stipulate to the matter set forth in the stipulation, but we reserve the right as to objections as to competency and materiality, and I want to object to the use

of the stipulation in evidence on the ground that the matters set forth in the stipulation would not be relevant or material in this case, having no bearing upon the issues in the case.

The Court: Admitted, subject to the objection.

(Stipulation by and between the attorneys for the respective parties in re testimony of Mabel E. Wisting, Plaintiff, thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Sandeberg: The other matters I will withhold offering at this time. [21]

The Court: You rest, then?

Mr. Skulason: May I ask the Court a question? Are we going through the formalities of pre-trial procedure or trying the case?

The Court: Just the trial.

Mr. Skulason: This is the trial of the case?

The Court: Correct.

Mr. Sandeberg: Mr. Sayre, have you any previous premium receipts?

Mr. Sayre: We have not the file of premium receipts, but we have the collection card which I think is a better record to work from. It shows the dates the premiums were paid. This comes from the records of the company.

Mr. Sandeberg: You have no premium receipts?

Mr. Sayre: We have only copies. This is November 21, 1946——

Mr. Sandeberg: That, of course, is the premium notice.

Mr. Sayre: The premium notice. We have the

collection card which shows the date of payment of all premiums.

Mr. Sandeberg: May I put this in evidence or do you intend to put it in?

Mr. Sayre: We are perfectly willing to put it in. If the Court please, I might say for the record that digging out of the copies of premium notice over a twenty-year period would be quite a job, and probably many of the records go back that far and would not be available, but the collection card would show [22] all the dates of payment and the amounts.

Mr. Sandeberg: Would you mark this for identification?

(Premium Notice, in Amount $66.05, due date November 21, 1946, thereupon marked Plaintiff's Identification No. 4.)

Mr. Sandeberg: There is a letter that the insured wrote when he asked that the loan be made.

Mr. Sayre: I don't know of any such a letter.

Mr. Sanderberg: Didn't he write you about it?

Mr. Sayre: I think possibly that sort of a matter should be covered by Mr. Calderwood on the witness stand. I believe the records contain some letters, some correspondence, which passed back and forth, but we do not have in our records, and have not been able to find, a letter from him to the company, asking for a loan. It is possible that he negotiated that part of it with a representative of the company, because there are numerous representatives of the company. Nevertheless, we have the

loan agreement and the records of the loan, but as far as the letter itself is concerned, we do not have that.

Mr. Sandeberg: If you have got your letter of transmittal of the loan, I would like to have that marked.

Mr. Sayre: I might say, your Honor, that the company keeps a folder on each policy, including the company's record of the policy, and all matters relating to it. I would suggest that if we are going to put part of this in that we should mark the [23] record of this policy. I am perfectly willing that the entire matter be admitted in evidence.

The Court: Do it that way. Let the file all go in as one exhibit.

Mr. Sandeberg: Are you putting that in?

Mr. Sayre: It is all right if it goes in as our exhibit.

Mr. Sandeberg: All right; put it in, then. If you want, you can put the card in, too, and the whole business. Do I understand that is your entire file?

Mr. Sayre: That is all, except the checks. Those were not part of that file.

(Correspondence file of defendant relating to insured thereupon received in evidence and marked Defendant's Exhibit No. 8.)

The Court: The question now is: Have you rested, Mr. Sandeberg?

Mr. Sandeberg: I will in a second, your Honor.

Mr. Sayre: We would like to have the whole matter in. I will stipulate with them right now that they go in.

Mr. Sandeberg: I would like to have that go in as a defendant's exhibit.

Mr. Sayre: If you want that all in as a defendant's exhibit, I will do that eventually.

Mr. Sandeberg: All right. We rest.

(Plaintiff Rests.) [24]

Mr. Sayre: For the record, your Honor, I would like to move for a nonsuit. I will not burden the Court with any argument, unless you so desire.

The Court: I will reserve decision to the end of the case.

Defendant's Testimony

Mr. Sayre: We would like to call Mr. Calderwood, the Secretary of the Standard Insurance Company.

ROBERT W. R. CALDERWOOD

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sayre:

Q. Mr. Calderwood, you are Secretary of the Standard Insurance Company? A. I am.

Q. Are you familiar with the Gustav H. Wisting policies? A. I am.

Q. You have brought the records concerning those policies to this Court? A. I have.

(Testimony of Robert W. R. Calderwood.)

Q. The policy in question in this litigation bears your number 34538? Did the insured, George H. Wisting, or Gustav H. Wisting, have other insurance with your company? A. He did. [25]

Q. Were those other policies paid?

A. Yes, they were.

Q. This policy, No. 34538, was that paid or not?

A. No, it was not.

Q. For what reason was this policy not paid?

A. It was not in force at the time of his death.

Q. You have brought the records. May we have the file? May I ask, is there a memorandum in the exhibit (Defendant's Exhibit No. 8) concerning the calculation on this policy? It is a plain typewritten page with the calculations. It is a letter-sized page, with calculations.

The Court: You will have to come up and look.

Mr. Sayre: I believe Defendant's Exhibit No. 8 has been identified. We would like to offer it in evidence at this time, being the file covering Policy No. 34538. The record may show that, at Counsel's suggestion, we are putting in the original of the letter of January 8, 1947, in lieu of the copy of the lapse notice which was loose in the file. The original which Mr. Sandeberg has asked be put in, which has been marked Plaintiff's Exhibit No. 6 for Identification, has attached to it the application for reinstatement.

Mr. Sandeberg: I would like to have that marked.

(Testimony of Robert W. R. Calderwood.)

(Letter dated January 8, 1947, Standard Insurance Company to Mr. George H. Wisting, re: Policy No. 34538, with blank form of application for [26] reinstatement attached, thereupon received in evidence and marked Plaintiff's Exhibit No. 6.) (Part of Defendant's Exhibit No. 8.)

Mr. Sandeberg: The Clerk has just handed me Plaintiff's Exhibit No. 7 for Identification. I thought I had offered this and that it had been received.

Mr. Sayre: There is no objection to the admission of Plaintiff's Exhibit No. 7 for Identification. It is my understanding that stands in lieu of the original.

Mr. Sandeberg: Yes, it stands in lieu of the original.

The Court: It may be admitted.

(Document heretofore marked for identification as Plaintiff's Exhibit No. 7 thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Sayre): On this file (Defendant's Exhibit No. 8), can you give the history of this policy and tell us, first, what the premiums were in 1946 and why they were different than in the original policy?

A. The policy originally did not provide added benefits for disability and waiver of premium.

(Testimony of Robert W. R. Calderwood.)

Those two added benefits were included in the policy at a later date.

Q. Was the premium of $66.05 the correct sum, the correct semi-annual premium, in 1946?

A. It was. [27]

Q. What were the due dates for the premiums?

A. I would have to have the policy.

Mr. Skulason: Isn't that shown by the record? There is no need of spending the time of this witness.

The Court: Mr. Sayre may put it in the way he wants to.

A. The premium due dates were May 21st and November 21st.

Mr. Sandeberg: With regard to this file of the company (Defendant's Exhibit No. 8), I am going to make a blanket objection to the introduction thereof and not argue it at this time, to save the time of the Court. My objection is that it is incompetent, irrelevant and immaterial.

The Court: Admitted, subject to objection.

Q. (By Mr. Sayre): By reference to the record of this policy (Defendant's Exhibit No. 8), will you tell the Court when the insured George H. Wisting (Gustav H. Wisting) borrowed money on that policy?

I beg your pardon. Perhaps I should put in one more exhibit before I go into this matter, if I may. May we have the duplicate of the check and the memoranda of the loan marked as Defendant's Exhibit No. 9?

(Testimony of Robert W. R. Calderwood.)

Mr. Sandeberg: May the record show, in order to save time, that I am making a general objection on the ground of incompetency, irrelevancy and immateriality as to all of these exhibits Counsel is offering.

The Court: It is so understood. Admitted.

(Duplicate copy of Check No. A-97634, in amount $2,477.30, Standard Life Insurance Company, payable to George H. Wisting, and attached memoranda, thereupon received in evidence and marked Defendant's Exhibit No. 9.)

Mr. Sayre: May we have marked as an exhibit memoranda of calculations upon this policy, Policy No. 34538.

Mr. Sandeberg: The same objection.

The Court: Admitted, subject to the objection.

(Memorandum containing calculations as to Policy No. 34538, George H. Wisting, thereupon received in evidence and marked Defendant's Exhibit No. 10.)

Mr. Sayre: Will the Bailiff please hand Exhibits 9 and 10 to the witness.

Q. Will you, Mr. Calderwood, from the file, review the history of the loan, the payment of premiums and the notices given?

A. On October 28, 1946, the company made a loan on this policy for the full value at that time. They deducted the interest on the existing loan up to the date of the new loan, and this loan, in con-

(Testimony of Robert W. R. Calderwood.)

junction with loans on other policies, was completed and a check for the gross amount of all loans was forwarded to him on that date.

Q. Would you give the breakdown on the loan on Policy No. 34538?

A. The new loan in this case amounted to $1,394. The old loan, [29] then existing, amounted to $600. This made an increase of $794. The interest deducted amounted to $15.70, making the net proceeds to the insured on this policy $778.30.

Q. Was that the full loan value on the policy?

A. That was the full loan value of the policy at that time.

Mr. Sandeberg: If the Court please, I did not get my objection in soon enough, but I believe the policy is the best evidence of the full loan value, and that this is a conclusion of the witness. I should like to have an objection to any testimony of this nature.

The Court: Proceed. It is admitted, subject to the objection.

Q. (By Mr. Sayre): Mr. Calderwood, when was the next premium due date?

A. The next premium due date was November 21, 1946.

Q. When was a notice mailed to the insured of the November 21, 1946, premium due? Will you give us the exhibit number of the pink slip?

A. Exhibit No. 7.

Q. What is that?

(Testimony of Robert W. R. Calderwood.)

A. That is the company's record of the issuing of the notice.

Q. When was that notice mailed to the insured?

A. That notice was mailed to the insured approximately fifteen days prior to the due date of the premium.

Q. How was that notice given? Will you explain.

A. The notice was mailed in the—deposited in the mail, [30] addressed directly to the insured at his address, 3378 Tareco Drive, Los Angeles, California.

Mr. Sayre: May we at this point have the original notice which has been brought to court by Mr. Sandeberg, marked as Exhibit No. 4, shown to the witness.

(Plaintiff's Exhibit 4, original notice, thereupon received in evidence.)

(Plaintiff's Exhibit No. 4 handed to the witness.)

Q. (By Mr. Sayre): Plaintiff's Exhibit No. 4, is that the original of the office record which you have been testifying concerning?

A. That is the original notice, yes.

Q. That was the notice you mailed to the insured?

A. Yes, that was the notice mailed to the insured, showing the premium which became due, $66.05.

(Testimony of Robert W. R. Calderwood.)

Q. Was the premium which became due on November 21, 1946, paid? A. It was not.

Q. Was any premium paid for the premium of May 21, 1946?

A. The company placed an automatic premium loan against the contract which carried the contract from November 21, 1946, to November—from May 21, 1946, to November 25, 1940.

Q. Do you have a memorandum of the calculation of the automatic loan against this policy?

A. I do.

Q. What is the exhibit number? A. 10.

Q. Exhibit No. 10 represents the calculation of the automatic [31] loan against the policy, is that correct? A. It does.

Q. By reference to that, will you state what the full loan value was to the date of the automatic loan?

A. The full loan to November 26th——

Mr. Sandeberg: The same objection.

A. ——the date to which the loan ran, amounted to $1,402.36.

Q. (By Mr. Sayre): What were the charges against that?

A. The charges against that were the original loan of $1,394, the loan interest due and unpaid from October 28th to November 21st of $5.16, a portion of the premium to November 25th of $1.45 and additional interest on the increased loan of $1.81, bringing the total outstanding on November 25th to $1,402.42.

(Testimony of Robert W. R. Calderwood.)

Q. Exceeding the then loan value?

A. Slightly in excess, yes.

Q. Mr. Calderwood, in making the loan which was closed on October 28, 1946, if an additional semi-annual premium had been deducted to carry the policy to May 21, 1947, would there have been an additional loan value and, if so, would the deduction for premium have equaled the additional loan value? Will you explain that?

A. The deduction of an additional premium, assuming a premium paid then, would have automatically increased the loan value. The amount receivable by the insured would be less in that event.

Q. Would it be correct to say that the insured would have [32] borrowed less if the next semi-annual premium had been deducted?

A. That would be true.

Q. Can you say by approximately what amount?

A. I don't have before me the exact figures on that.

Q. I believe that is immaterial. Mr. Calderwood, did you give the insured notice of the lapse of this policy? A. We did.

Q. I believe it is Exhibit No. 6. Is that the correct exhibit? Was that notice (Plaintiff's Exhibit No. 6) given to the insured?

A. That was given on January 8th.

Q. How was that notice given?

A. In the form of a letter deposited in the mail on that date.

(Testimony of Robert W. R. Calderwood.)

Q. Addressed to the insured?

A. Addressed to the insured at the address given.

Q. To his address in Los Angeles, California?

A. That is right.

Q. Exhibit No. 6, introduced by the plaintiff, is the original of that notice?

A. This is the original.

Q. Did the insured sign a loan agreement on that loan? A. He did.

Q. Is that part of the file shown in Exhibit No. 8?

A. Exhibit No. 8, that is a part of the file.

Q. Was a statement of the loan given to the insured at that time? [33] A. It was.

Q. And did the insured return the original of the statement and the loan agreement to you?

A. Yes, he did. He returned that to us.

Q. Both the loan agreement and the original of the statement were had by the insured prior to the completition of the loan? A. They were.

Q. Has the loan which, on November 25, 1946, amounted to $1,402.42 ever been paid to the company? A. It has not.

Mr. Sandeberg: What was the figure you read?

Mr. Sayer: I asked him whether the loan which on November 25, 1946, was in the sum of $1,402.42 had been repaid, and the witness answered that it has not been paid.

Q. Has any part of the indebtedness on the policy, Policy No. 34538, been paid?

(Testimony of Robert W. R. Calderwood.)

A. No part of it has been paid.

Mr. Sayre: I believe that is all.

Cross-Examination

By Mr. Sandeberg:

Q. Mr. Calderwood, according to your files, between the date that the premium notice was sent, which I believe you said was about fifteen days before the due date for the premium to be paid or about fifteen days before November 21, 1946, and the date, January 18, 1947, the date of the insured's death, was [34] any notice of any sort sent to the insured, or any mail directed to him, save and except the lapse letter dated January 8th?

A. No notice was sent.

Q. So the only thing sent to him between the time of receiving the premium notice about the 5th of November and the date of his death, was the lapse letter, is that correct?

A. That is correct.

Q. Are you familiar with the policy loan agreement which is in evidence as part of Defendant's Exhibit No. 8? Are you familiar with its terms generally? A. Yes.

Q. Do you know when this agreement provides that interest is to be paid on the policy or on the loan?

A. The anniversary date of the policy.

Q. Would this be correct: "To pay the company on the next premium anniversary of said policy interest on said loan at the rate of six per

(Testimony of Robert W. R. Calderwood.)

cent per annum from the date of this agreement to said anniversary." Would that be correct?

A. That is correct.

Q. When was that anniversary?

A. The next anniversary date of the policy would be May 21st.

Q. "To pay the company on the next premium anniversary of said policy interest on said loan at the rate of six per cent per annum from the date of this agreement to said anniversary."

As a matter of fact, then, there was no interest due [35] on this policy until the next anniversary date, was there?

A. No, there would be no attempt to collect interest until the next anniversary date.

Q. That is correct? A. Yes.

Q. Why did you deduct interest on November 21st to bring the old loan into the same position as the new loan? Do you deduct interest if it is not due?

A. It was due on the old loan. We have to include the old loan in the new loan.

Q. Mr. Calderwood, I will refer you to the computation from which you have been testifying (Defendant's Exhibit No. 10). I will ask you why, on November 21, 1946, you deducted interest? November 21st is the date I am speaking of, not October 28th. Why did you deduct interest at that time?

A. Interest must be taken into consideration to

(Testimony of Robert W. R. Calderwood.)

determine the net amount available to pay premiums.

Q. You did that regardless of the fact that the loan agreement provided that there was no interest due until May?

A. Interest woul dnaturally be due in May if we gave him the full amount, if the company loaned the entire value, and if interest was not paid in May we would not be able to collect that amount.

Q. Mr. Calderwood, you just told me that this agreement provides for payment on the next premium anniversary, to pay the company [36] interest at the rate of six per cent, and you said the next premium anniversary was in May.

What I am asking you is this: I understand you collected interest on the previous loan when the new loan was made in October. I know you did that. Why, in November, did you deduct interest, or did you apply part of the cash value or loan value?

A. That is right, part of the cash value. What would be used to pay interest if it was not paid that way?

Q. Even though it was not yet due?

A. That is right.

Q. Under the terms of the loan agreement?

A. It would be due if the premium were not paid. In order to determine the value, we had to carry the policy further.

(Testimony of Robert W. R. Calderwood.)

Q. As it stands now, then, though the loan agreement provides that interest is not yet due, you go ahead and consider an indebtedness against the policy, is that correct?

A. That is right.

Q. Why did you deduct anything for interest after November 21st until the 25th of November?

A. It would be necessary to do so to get your calculation to determine the net value.

Q. Is there any provision in the policy—You contend that it lapsed and that the automatic premium loan provision went in on the 21st of November, do you not? [37]

A. That is right.

Q. When the automatic premium loan goes in, do you continue to charge interest on the loan?

A. We do.

Q. Is there anything in the policy that states you have that right? A. You have to.

Q. I asked you if there was anything in the policy that states you have that right?

A. In the automatic premium loan provision, yes.

Q. Will you point that out to me, please? I am asking you to point out where, in the policy, you are given the right to deduct that interest.

Mr. Sayre: After all, your Honor, this is a matter of reading the policy. I think it is argumentative and objectionable for that reason.

The Court: He may answer, subject to the objection.

(Testimony of Robert W. R. Calderwood.)

A. The policy provides in Section VII that in such event the company will "without request, charge the amount of such premium, with interest in advance to date next premium is due."

Q. (By Mr. Sandeberg): That is interest on the premium, isn't it?

A. Yes, that is interest on the premium. It states further: "The whole or any part of the indebtedness may be repaid at any time while the policy is in force." Then it says: "The existing [38] indebtedness may be paid either in whole or in part, or allowed to remain as a loan on the policy, subject to interest."

Q. Which provision is that?

A. That is in the "Automatic Premium Loan" provision.

Q. That provision says that the insured may pay it, is that correct? So, while the automatic premium loan provision is in effect, the insured had a right to repay the loan in whole or in part, is that correct?

A. That is right, or may allow the loan to stand, subject to interest.

Q. Paragraph III of the loan agreement reads as follows: "Failure to repay said loan, with interest, as herein provided, or to pay any indebtedness on account of said policy, or the interest thereon, shall not terminate the policy unless the total indebtedness thereunder, including accrued or accruing interest, shall equal or exceed the loan

(Testimony of Robert W. R. Calderwood.)

value of the policy at the time of such failure." Do you recognize that provision? A. Yes.

Q. Do you recognize the next sentence in Paragraph III of the loan agreement? "In this event the policy shall terminate 31 days after the company shall have mailed notice to the last known address of the insured and any assignee of record, and shall be deemed surrendered in consideration of the cancellation of all indebtedness thereunder." Do you recognize that provision of the loan agreement? [39] A. Yes.

Q. Why didn't you mail that notice?

A. In this case the insured had received notice of his premium and not only failed to pay the interest on the loan, but he failed to pay the premium then due.

Q. Was any notice whatsoever sent the insured concerning the loan after the loan was made? Between then and the time of his death was any notice whatsoever sent to him concerning the loan?

A. No notice concerning the loan.

Q. No notice whatsoever?

A. Until the lapse letter went January 8th.

Q. Did the lapse letter say anything about the loan?

A. I would have to read it. No, the lapse letter did not mention the loan.

Q. So no notice of any sort was mailed to him about the loan? A. No.

Mr. Sandeberg: That is all.

Mr. Sayre: That is all.

(Witness excused.)

Mr. Sayre: If the Court please, we understand there is no objection to copies in place of originals, in connection with all these exhibits. If that is so, that being the case, we rest.

(Defendant Rests.) [40]

Mr. Sandeberg: There is one letter, that of April 1st, 1947, a copy of which we have marked Exhibit No. 5, which should perhaps be in.

(Copy of letter dated April 1, 1947, R.W.R. Calderwood, Secretary, Standard Insurance Company, to Mrs. George H. Wisting, thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Sandeberg: The plaintiff would ask leave of the Court at this time to amend in conformity with the proof in this matter, as it has developed either by way of the amended complaint or by the reply.

The Court: Do you have any rebuttal?

Mr. Sayre: No, we have no rebuttal.

The Court: I will tell you what I want you to do, Gentlemen: I want you to state your positions in writing and then I will hear you in argument afterwards. Mr. Sandeberg, you write up what amendments you want to make.

Mr. Sandeberg: All right, sir.

The Court: We will follow our usual course

here. You will file your statement first, Mr. Sandeberg. How much time do you want to take? Take whatever time you need.

Mr. Sandeberg: Would two weeks be satisfactory?

The Court: Yes. You want two weeks, also?

Mr. Sayre: Yes, your Honor. [41]

Mr. Sandeberg: May I have access to the exhibits?

The Court: All right.

Mr. Sayre: I suggest that both counsel, for the plaintiff and for the defendant, have access to the exhibits for the purpose of preparation of their statements.

The Court: Yes. That can be arranged.

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Official Reporter of the above-entitled Court, do hereby certify that on Friday, the 4th day of February, A.D. 1949, I reported in shorthand certain proceedings had upon the trial of the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of pages numbered 1 to 42, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 16th day of June, A.D. 1949.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed July 8, 1949. [42]

[Endorsed]: No. 12330. United States Court of Appeals for the Ninth Circuit. Standard Insurance Company, a corporation, Appellant, vs. Mable E. Wisting, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed Aug. 15, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12330

MABLE E. WISTING,

Appellee,

vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon corporation,

Appellant.

ORDER

This matter coming on to be heard upon the Motion of the appellant for an Order dispensing with the printing in the printed transcript of record on appeal herein of all exhibits introduced by plaintiff or defendant during the trial of this cause;

And it appearing that such Motion is based upon a Stipulation therefor between appellant and appellee, and that said Motion is well taken and should be allowed;

Now Therefore, It Is Hereby Ordered, that the printing in the printed transcript of record on appeal herein of all exhibits introduced by the plaintiff or defendant during the trial of this cause be and the same hereby is dispensed with, and that this Court shall consider such exhibits in their original form without reproduction in the printed transcript of record on appeal.

Dated this 23rd day of August, 1949.

/s/ WILLIAM DENMAN,

Judge, United States Court of Appeals for the Ninth Circuit.

/s/ HOMER T. BOONE,

/s/ WM. E. ORR,

Judge U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

[Title of Court of Appeals and Causes.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Paul A. Sayre, being first duly sworn on oath, depose and say: I am one of the attorneys for the appellant in the above entitled cause.

All exhibits introduced by plaintiff or defendant during the trial of this cause have been designated as portions of the record on appeal pursuant to Rule 75(a). Several of such exhibits contain extraneous material not pertinent to the issues on appeal and are in such form and length that they cannot be practicably reproduced in the printed transcript of record on appeal. In order to avoid unnecessary lengthening of the record and consequent additional expense, the appellant and appellee have entered into a Stipulation in which they have agreed, subject to approval of this Court,

that all original exhibits introduced by plaintiff or defendant during the trial of this cause may be considered in their original form without reproduction in the printed transcript of record on appeal.

/s/ PAUL A. SAYRE,

Subscribed and sworn to before me this 22d day of August, 1949.

[Seal] /s/ J. H. HOLLOWAY,
Notary Public for Oregon.

My Commission Expires 10/7/49.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

[Title of Court of Appeals and Cause.]

MOTION

Comes now the appellant and moves the Court for an Order dispensing with the necessity for reproducing in the printed transcript of record on appeal herein all exhibits introduced by plaintiff (appellee) or defendant (appellant) during the trial of this cause, and directing that such exhibits will be considered by this Court in their original form without reproduction in the printed transcript of record on appeal. This Motion is made upon the ground and for the reason that several of such exhibits contain extraneous material not pertinent to the issues on appeal and cannot be practicably reproduced in their entirety in the printed record, and is based upon the affidavit of Paul A. Sayre, and the Stipula-

tion of the appellant and appellee hereunto attached.

Dated at Portland, Oregon this 22nd day of August, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE.
By/ s/ PAUL A. SAYRE,
Attorney for Appellant.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL TO BE PRINTED

It is hereby stipulated and agreed by and between the appellant and the appellee herein by and through their respective attorneys of record that several of the exhibits introduced during the trial of this cause contain extraneous material not pertinent to the issues on appeal, and are in such form and length that they cannot be practicably reproduced in the printed transcript of record on appeal, and that in any event their reproduction in the printed transcript of record on appeal would unnecessarily lengthen the record and substantially increase the expense of printing it.

And it is further stipulated and agreed that, subject to the approval of this Court, all exhibits introduced by plaintiff or defendant during the trial

of this cause may be considered by this Court in their original form without reproduction in the printed transcript of record on appeal, and that the appellant shall forthwith move this Court for an Order dispensing with the printing of such exhibits and directing that they will be considered by this Court in their original form without reproduction in the printed transcript of record on appeal.

And it is further stipulated and agreed that the following shall be included in the printed transcript of record on appeal herein, and the appellant and appellee hereby designate the following:

1. The entire certified Transcript of Record herein, including:

(a) Items 1 to 18, inclusive, of Appellant's Designation of Portions of Record on Appeal Pursuant to Rule 75(a), except such exhibits as the Court may order to be considered in their original form without reproduction in the printed Transcript of Record on appeal.

(b) Items 1 to 7, inclusive, of Appellee's Designation of Portions of Record on Appeal Pursuant to Rule 75(a).

2. Motion of Appellant for an Order dispensing with the printing of exhibits in the printed Transcript of Records on Appeal, and Affidavit in support thereof.

3. Order of the United States Court of Appeals for the Ninth Circuit dispensing with the printing of exhibits in the printed transcript of record on appeal and directing that such exhibits shall be con-

sidered by said Court in their original form without reproduction.

4. This Stipulation as to contents of record on appeal to be printed.

Dated this 22nd day of August, 1949.

/s/ PAUL A. SAYRE,
Of Attorneys for Defendant-Appellant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff-Appellee.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

No. 12330

In The United States Court of Appeals For the Ninth Circuit

STANDARD INSURANCE COMPANY,
a corporation,
Appellant,

vs.

MABLE E. WISTING, *Appellee.*

Appellant's Brief

On Appeal from the United States District Court
for the District of Oregon

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FILED
DEC 1949
PAUL P. O'BRIEN,

DAILY JOURNAL OF COMMERCE

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No. 12330

In The United States Court of Appeals For the Ninth Circuit

STANDARD INSURANCE COMPANY, a corporation, *Appellant*,

vs.

MABLE E. WISTING, *Appellee*.

Appellant's Brief

On Appeal from the United States District Court for the District of Oregon

JURISDICTION AND PLEADINGS

This is an action at law instituted after the death of the insured by the beneficiary of a policy of life insurance. The Appellee (plaintiff below) is a citizen of the State of California and the Appellant (defendant below) is a corporation organized under the laws of the State of Oregon. The jurisdiction of the District Court

is based upon diversity of citizenship and the fact that the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. The District Court's jurisdiction arises under *U.S.C.A. Title 28, Section 1332*, and the matter is reviewable in this Court by virtue of *U.S.C.A. Title 28, Section 1291*. The jurisdictional facts are pleaded in Appellee's Complaint, *Transcript of Record* (hereinafter referred to as *Tr.*) *pp. 2 and 3*, and are admitted by the Appellant's answer, *Tr. pp. 4 and 5*.

STATEMENT OF THE CASE

On May 26, 1927 the Appellant, Standard Insurance Company, which was then called Oregon Life Insurance Company, issued to the insured, Gustav H. Wisting, also known as George H. Wisting, the policy of life insurance which is plaintiff's Exhibit 2. It was an ordinary life policy with a death benefit of $5,000.00 payable to the named beneficiary upon the death of the insured. By the terms of the policy, the insured was required to pay semi-annual premiums in advance. The semi-annual premium payable at the times pertinent to this action amounted to $66.05. The insured paid the premium which fell due on May 21, 1946; on October 25, 1946, borrowed the full cash value of the policy; but failed to pay the semi-annual premium which fell due on November 21, 1946. Thereafter the insured died on January 18, 1947.

The usual notices of premium due and of lapse for non-payment of premium were mailed to the insured, plaintiff's Exhibits 4 and 6. These facts are not in dispute. See Court's *Findings No. X and XIV, Tr. pp. 16, 17 and 18.*

The appellant contends: that said insurance policy lapsed because of the failure of the insured to pay the premium which became due November 21, 1946; that the thirty days' grace allowed the insured by the policy and by state law within which to pay the premium expired December 21, 1946; that failure to pay the premium within that time caused the policy to lapse; and that the policy was not in force at the date of the death of the insured on January 18, 1947. All parties have conceded as shown by *Findings X and XIV, Tr. pp. 16, 17 and 18*, which were submitted by Appellee and approved by the Court, that the policy lapsed, unless non-forfeiture provisions of the policy may be invoked to keep the policy in force to the said date of death.

At the trial of this cause, Appellee's counsel seemed to urge three grounds for holding that the policy was kept in force to the date of death of the insured even though the last semi-annual premium had not been paid. They were: (1) That the policy was continued in force by virtue of a waiver of premium under the special endorsement for additional benefit for total and per-

manent disability, which endorsement had been added to the policy. This was later abandoned. (2) That at the time the insured borrowed the full cash value of the policy, in October, 1946, the Company should not have loaned the full amount, but should have deducted a premium from the loan sufficient to carry the policy to the next anniversary date, namely, to May 21, 1947. This claim was also abandoned. (3) That the policy had loan values at the date of default, namely, November 21, 1946, sufficient to keep the insurance in force to the date of death, January 18, 1947, under the automatic premium loan provision of the policy. This contention became the basis of the trial court's decision.

Although the first two contentions of the Appellee, as set forth above, were dropped, it seems proper to point out in passing as follows:

As to the first contention, namely, waiver of premium, it will be noted by reference to the endorsement on the policy, plaintiff's Exhibit 2, that waiver of premium for disability applies to premiums falling due after the commencement of disability which was not the situation in this case, that total disability must continue for a period of six months and that death does not constitute total disability. This question has been well considered and decided by many Courts. We cite the following: *Bennett vs. Metropolitan Life Insurance Co.*,

173 Ore. 386, 145 Pac. (2d) 815; also *Hinkley et al vs. Penn Mutual Life Ins. Co., 37 Fed. Sup. 1018.*

The second contention, namely, that the premium should have been deducted from the loan, was based on Paragraph V, "Cash Loans," Page 2 of the insurance policy, Plaintiff's Exhibit 2. The question presented was well considered and determined adversely to the Appellee's contention by this Court in the case of *Griffin vs. Travelers Insurance Company, 122 Fed. (2d) 395, 137 A.L.R. 829.* Other cases of similar holding are listed in the note in *137 A.L.R. at p. 836.*

Having abandoned the other two contentions, Appellee's counsel argued and submitted Appellee's case to the Court on the third contention, namely, that the policy was kept in force by virture of the provisions of paragraph VII of the policy of insurance, plaintiff's Exhibit 2, concerning automatic premium loans. The decision of the case at the trial and therefore on this appeal rests upon the application of the facts to and the interpretation of the said paragraph VII of the insurance policy.

Whether the policy was kept in force by an automatic loan renders necessary an analysis of the policy provisions and of the cash or loan value of the policy at the date of default, namely, November 21, 1946. By reference to the policy, it will be noted that the insured

had previously elected the automatic loan option of the policy rather than the extended insurance option. Therefore, application of the automatic loan option to any reserve or cash value of the policy was mandatory upon the Company.

Prior to October 25, 1946, the insured applied for and received a loan upon said insurance policy for the maximum amount which could be loaned. The appellant, in accordance with the insured's request, calculated the maximum loan by giving the insured credit for the full cash value at the next premium due date, namely, November 21, 1946, which full cash value amounted to $1401.00. That amount was fixed by the tables in the policy, being the amount of cash value accrued at the previous policy anniversary, May 21, 1946, plus one-half of the increase in cash value which would have been credited at the next policy anniversary. In making the maximum loan, it was necessary for the Company to ascertain the maximum amount which could be loaned and, with the accumulation of interest thereon to the next premium due date, still keep the company secured on that date for all indebtedness, both principal and interest. Therefore, it was calculated that a loan of $1394.00 could be made and still have security for the loan and interest thereon without exceeding the loan value of $1401.00 on November 21, 1946. $1,394.00 was therefore loaned to the insured un-

der the loan agreement which was executed by the insured and which is included in Defendant's Exhibit 8. The disbursement of the loan was itemized in a statement to the insured which also is included in Defendant's Exhibit 8 and which shows that a former loan of $600.00, with accrued interest of $15.70, was deducted and that the balance of $778.30 was paid to the insured. The insured did not return the executed loan agreement until October 28, 1946, at which time the Appellant's check was forwarded to the insured. The insured's delay in returning the loan agreement caused a delay in the payment and a resulting credit on account of unearned interest, which created a credit in favor of the insured on November 21, 1946 amounting to less than $2.00. That credit of less than $2.00 was the remaining cash value which could be used for automatic loan purposes if the premium was not paid.

On or about the 7th day of November, 1946, the Appellant mailed to the insured the regular notice that the semi-annual premium of $66.05 would be due on November 21, 1946. This notice, plaintiff's Exhibit 4, was produced in Court by the Appellee and was admittedly received by the insured. When the premium was not paid on or before December 21, 1946, namely, within the thirty days' grace period, the Appellant declared the policy lapsed, Plaintiff's Exhibit 6. The ques-

tion, then, is whether there was any loan value under which an automatic loan could be made to carry the policy any longer. The appellant calculated the matter upon a day to day basis and on a semi-annual premium basis, which was the most favorable method for the insured, and its calculations showed that the policy could not be carried by an automatic loan beyond November 25, 1946. The calculation was set forth in Defendant's Exhibit 10, and is as follows:

GEORGE H. WISTING
POLICY NO. 34538

Cash value as of 5-21-46	$1,356.00	Policy Loan on 11-21-46	$1,394.00
Cash value as of 5-21-47	1,446.00	Loan interest due and unpaid from 10-28-46 to 11-21-46	5.16
Difference for year	90.00		
No. of days from 5-21-46 to 11-25-46 = 188		S-A Premium due 11-21-46 $66.05 No. of days from 11-21-46 to 11-25-46 = 4	
Amount of increase		$\frac{4}{182.5}$ = % (S-A Basis)	
$\frac{188}{365} \times \$90.00$	46.36	Amount of premium due 11-21-46 to 11-25-46	1.45
		$\left\{\frac{4}{182.5} \times \$66.05\right\}$	
		Additional interest 6% on loan 11-21-46 to 11-25-46	1.81
Cash value as of 5-21-46	$1,356.00	$\left\{\frac{4}{182.5} \times .06 \times \$1,394.00\right\}$	
Total cash value on 11-25-46	$1,402.36	Total loan Outstanding 11-25-46	$1,402.42

The Appellee's contention, supported by the trial court's decision, is that interest could not be charged on the existing loan in ascertaining the amount available for an automatic loan, and that, by leaving the interest out of the calculation, the value would increase from day to day, so that the loan value would pay the premium necessary to continue the policy in effect to a day or two beyond the date of death. The Appellant contends that such an interpretation of the automatic loan provision is contrary to the language of the provision and would compel the Appellant to make the loan without security for the interest thereon. This case, therefore, turns upon the construction of the policy provisions in regard to interest and the law upon that point.

SPECIFICATIONS OF ERROR

I.

The Court erred:

(a) In finding that the insured, Gustav H. Wisting, also known as George H. Wisting, performed all conditions precedent to continuing the life insurance policy in question in force until the date of the death of the insured, namely, January 18, 1947: *Tr. p. 16, Finding VI.*

(b) In failing to find that the said policy lapsed for non-payment of premium upon the expiration of thirty

(30) days of grace allowed by the policy, namely, on December 21, 1946.

II.

The Court erred in finding that the policy of life insurance in question was kept in force until the date of the death of the insured by virtue of an automatic loan under the terms of the policy, and in making the following specific findings in regard thereto:

(a) In finding that there was any loan value in said policy of a sufficient amount that an automatic loan must be made to keep said policy in force until January 18, 1947, the date of the death of the insured, or to January 23, 1947, or to any date subsequent to November 26, 1946; *Finding XVII, Tr. pp. 18 and 19.*

(b) In finding that the loan value of said policy increased by earnings which accrued from day to day to the date of death but that interest on indebtedness did not accrue from day to day to the date of death and did not become indebtedness decreasing the loan value. *Findings XX, XXI, XXII, XXIII and XXVIII, Tr. pp. 19 and 20.*

III.

The Court erred in that, contrary to law and contrary to the facts adduced at the trial of this case, it

gave judgment to the plaintiff for Five Thousand Dollars ($5,000.00), together with interest thereon at the rate of six percent (6%) per annum from January 18, 1947, until paid, less the sum of One Thousand Three Hundred Ninety-four Dollars ($1,394.00) together with interest thereon at the rate of six percent (6%) per annum from October 28, 1946, until payment of the judgment, and in giving judgment for the further sum of Seven Hundred Fifty Dollars ($750.00) attorney's fees, together with plaintiff's costs and disbursements. *Conclusions of Law I, II, III, IV, Tr., pp. 20 and 21, and Judgment, Tr. pp. 28, 29 and 30.*

SUMMARY OF ARGUMENT

The Appellee, both in the pleadings and in the proof at the trial, went only far enough to establish that the policy of insurance was issued to the insured by the Appellant and that the insured died on January 18, 1947. The Appellant pleaded and proved that the semi-annual premium which became due on November 21, 1946, was not paid and that a previous policy loan had used substantially all of the loan value of the policy at the date of default in payment of said premium. The Appellant contends that the policy lapsed by reason of the insured's failure to pay the premium of November 21, 1946.

Since the Appellee admits and the Court has found that the premium due November 21, 1946 was not paid, the case resolves itself into a question of whether the policy was kept in force until date of death by the automatic premium loan option of the policy. This, in turn, has been narrowed by the Appellee's contention that, under the automatic loan option, the Appellant is not entitled to deduct indebtedness, with interest to date of the automatic loan, from the cash or loan value of the policy. Appellant, therefore, argues that the policy provision requires inclusion of interest as a part of the indebtedness at the date of the automatic loan, whether the interest on indebtedness was then due or not. Authorities are cited for this principal of construction, and it follows that, if Appellant's proposition is correct in law, the policy had no loan value after November 25, 1946 and lapsed, upon the expiration of thirty days' grace, on December 21, 1946.

ARGUMENT

SPECIFICATION OF ERROR NO. 1. The Court found, *Tr. p. 16*, *Finding VI*, that the insured, during his lifetime, performed all conditions precedent to continuing said policy in force. This finding is in conflict with *Finding X*, *Tr. pp. 16 and 17*, which among other things finds that the last premium payment made by

the decedent was the one due May 21, 1946. Likewise in *Finding XIV*, *Tr. p. 18*, the Court makes the finding that a premium notice was mailed to the insured on or about November 7, 1946 notifying the insured that a premium would become due on November 21, 1946. Then the further finding is made "that said premium was never paid." The findings referred to were submitted by Appellee and the finding that the premium was never paid is in accord with the evidence, *Tr. pp. 77*. Therefore, the finding that all conditions precedent were performed by the insured is obviously in error.

The converse of said finding is necessarily true, and the Court should have affirmatively found that the policy lapsed for failure to pay the premium which fell due on November 21, 1946, unless it can be affirmatively shown that non-forfeiture provisions of the policy kept the insurance in force to the date of death. The latter point is treated under the next specification of Error.

SPECIFICATION OF ERROR No. II. In taking up the question presented by this specification, namely, whether an automatic loan kept the policy in force to the date of death, January 18, 1947, it should first be pointed out that the Appellant does not contend and never has contended that the policy lapsed by reason of foreclosure of the loan against it. On the other hand,

it has always been and now is contended by the Appellant that the policy lapsed for a failure to pay the premium of November 21, 1946. It is very true that, if the Appellant was seeking to foreclose the loan, it would have been necessary to send the notice specified in Paragraph 5 on page 2 of the policy, Plaintiff's Exhibit 2. This, however, is not the basis of lapse and should not be confused with the true cause of lapse, namely, failure to pay the premium. This question of foreclosure of loan has been urged in many cases; but we cite *Pacific Mutual Life Insurance Company vs. Davin, 5 Fed. (2d) 481*, wherein the Court holds that a policy will lapse for failure to pay a premium even though the loan is not foreclosed, and that, upon failure to pay the premium, the automatic options are applied and the amount of indebtedness on the loan then becomes material only for measuring the benefits which may accrue under the automatic non-forfeiture provisions.

Since the non-forfeiture option elected by the insured was the provision for an automatic loan in case of failure to pay premium, we must then examine what rights accrued to the insured thereunder when he defaulted in payment of the premium of November 21, 1946. As hereinbefore stated, Page 6, the insured applied for and received the maximum loan obtainable on the policy just a short time before default in payment

of the premium due. But for the credit which accrued to the insured on account of unearned interest which on November 21, 1946 amounted to less than $2.00, the entire loan value and reserve of the policy would have been consumed on that date. This small credit, however, was sufficient to carry the policy for an additional four or five days, but no more. The provision of the policy applying to this situation reads as follows:

> "VII *AUTOMATIC PREMIUM LOANS.* If this policy is not surrendered as above provided, said policy shall not lapse nor become void, provided that the then loan value hereon shall exceed the amount of any premium then unpaid and of any indebtedness of the Insured to the Company. In such event the Company will, without request, charge the amount of such premium, with interest in advance to date next premium is due, at a rate not exceeding six per centum per annum, as a loan against the policy, thereby continuing said policy in force, subject to such indebtedness, and this policy shall otherwise be entitled to all the privileges herein the same as if the premium had been paid in cash. Such loan shall be increased by the amount of subsequent premiums and interest as stated, as said premiums fall due and remain unpaid, and *this policy shall remain in force and effect as long as the increasing loan value hereof, including the loan value of any dividend additions then in force, is sufficient to pay for pro-rata insurance for one additional day, on a quarterly premium basis, and to secure all existing indebtedness hereon, with interest.*
>
> "At any time while this policy is in force under the preceding paragraph the Insured may resume payment of premiums without medical examination.

> The existing indebtedness may be paid either in whole or in part, or allowed to remain as a loan on the policy, subject to interest." (Italics ours)

Since the loan or cash value above indebtedness was not sufficient to pay the next premium, it is necessary to consider the last sentence in the first paragraph, which provides that the policy shall remain in force if the loan value "*is sufficient to pay for pro-rata insurance for one additional day on a quarterly premium basis and to secure all existing indebtedness hereon with interest.*" This has been interpreted by the courts to mean that the automatic loan must be applied on subsequent days to a date where the cash value, increased by the day to day accretion of cash value, will be consumed by the pro-rata portion of the premium to that date, plus all indebtedness plus interest on the indebtedness and interest on the premium to the said date. This formula was followed in the calculations set forth in defendant's Exhibit 10 heretofore quoted, Page 8. That calculation was made upon the basis of a semi-annual premium, and because of some question concerning whether it should be on quarterly premium basis, an alternative computation upon a quarterly premium basis is set forth in defendant's requested findings, *Tr. pp. 10, 11, 12 and 13.* Whether the semi-annual premium basis or

a quarterly premium basis is used would not make a difference of more than one day, in any event; and it will be seen, by reference to the computations, that the policy could not have carried beyond November 25, or 26 of the year 1946, it being, of course, remembered that the days of grace would extend the rights to December 21, 1946.

The question then resolves itself into one of whether or not the Appellant was entitled to include interest with the principal in ascertaining the total indebtedness which was to be deducted from the cash value. It is submitted that the language "existing indebtedness hereon with interest" is open to no other construction. Nevertheless the question has been the subject of litigation under policies of similar language and intent. The question has usually arisen in computing the cash value available to purchase extended insurance; and the question of interest is identical at the date of computation whether it be under the option for extended insurance or under the option for an automatic loan. We contend, however, that there is more reason for deducting all indebtedness, with interest, at the date of making a loan because of the necessity of including all indebtedness with interest in the amount of the new loan. It might also be pointed out that this method of including both principal and accrued interest to the date of the new

loan was used previously, namely, on October 25, 1946, and was approved by the insured when he signed the loan agreement, which is included in Defendant's Exhibit 8.

This question of whether all indebtedness, with interest, shall be deducted from the loan value has been considered by a number of courts.

In *Reynolds vs. Northwestern Mutual Life Insurance Company, 298 Mass. 208, 10 N.E. (2d) 70, 113 A.L.R. 603*, the premium was not paid, and it became a question of whether the provision for extended insurance would carry the policy to the date of death. The calculation depended upon the amount of indebtedness to be deducted, and the provision of the policy was that the cash value, less any indebtedness to the Company, should be applied in the purchase of extended insurance. In *113 A.L.R.*, at page 605, the Court states the question and answers it as follows:

> "But if from the reserve the defendant was entitled to deduct, in addition to the principal advance of $1,575, interest upon that advance from September 29, 1933, to December 5, 1933, amounting to $16.95, then the balance of $15.60 would have been sufficient only to provide such extended term insurance to February 9, 1934. If that is the proper computation, the insured died on February 10, 1934, without insurance, and the plaintiff cannot recover. The whole issue, therefore, relates to the propriety of deducting interest on the advance of $1,575.

"The only difficulty is caused by the language of the instrument signed by the insured when he obtained the advance of $1,575. He assigned the policy to the defendant 'as security for the repayment of said advance with interest' at the rate of six per cent per annum, 'payable annually.' The instrument provides that 'If the policy shall become extended term insurance the then existing indebtedness shall be adjusted as provided in the policy, or according to the company's practice if the policy contains no provision relating thereto.'

"The plaintiff contends that no interest on the advance could become due or payable until September 29, 1934; and that in the computation of the extended term insurance in December, 1933, or January, 1934, no interest could be considered because none was then due.

"The construction contended for by the plaintiff, in the event that the policy should be changed into extended term insurance under paragraph 11c, would leave the company dependent upon an unsecured personal obligation of the insured for the interest. There was no purpose to create any personal obligation at all. Paragraph 11g of the policy shows that both principal and interest form part of the 'total indebtedness' of the insured to the company, which is not permitted to become larger than the cash surrender value without avoiding the policy. That paragraph provides that the advances 'shall bear interest at a rate not to exceed six per cent per annum,' and does not suggest that the interest is not to accrue day by day. The actuarial computations by which the cash surrender value (paragraph 11a) is determined by deducting from the reserve 'any indebtedness to the company,' would become illogical and unscientific if interest on advances should not be figured day by day."

From another case directly in point upon the question of interest, we quote the following, the italics being those of the Court:

Garrett vs. Northwestern Mut. Life Ins. Co. (1942) 111 Ind. App. 502, 38 N.E. (2d) 874, at page 877.

"Appellant next contends that appellee improperly deducted interest on the loan from May 13, 1932 to January 12, 1933, amounting to $37.56 which was not yet due; that this amount would purchase extended insurance of $4,016.92 for a further period of 303 days, or to October 19, 1934, thus putting it in force at the time of the death of the insured.
"Appellant refers us to *Sec. 7 of Chapter 95, Acts 1909, Sec. 4622c, Burns' R. S. 1914*, which was in force at the time the policy was written, which section reads as follows:

> 'In ascertaining the *indebtedness due* upon policy loans the interest, if not paid when due, shall be added to the principal of such loans, and shall bear interest at the rate specified in the note or loan agreement.'

"But this section refers to calculation of indebtedness *due*. Both the section of the same act (Section 5, subsection 10) and the provisions of the policy (clause 11g) which refer to the amount to be used for extended insurance provide that it is to be calculated by deducting the '*existing indebtedness*.' Neither require that it shall be *due*. We think the clear intent is that interest on any loan shall be determined to the date of the default and a complete balance of accounts on account of the policy be made in finding the amount available to purchase extended insurance."

See also *3 Appleman Insurance Law and Practice, Sec. 1936, Pages 567-8.*

". . . In making calculation of the amount available for the purchase of extended insurance, it is necessary, when deducting the principal sum of indebtedness, also to deduct interest thereon, whether arising from ordinary loans or defaulted premiums. If, after making such deductions the remainder is sufficient to keep the contract in force until the insured's death, protection is afforded; if after deducting interest, such amount is insufficient, protection is lost.

"It has been held proper for the insurer to deduct interest for a fractional part of a year, even though the provision was that interest was to be paid annually . . ."

Many Courts have adopted the rule set forth in *Reynolds vs. Northwestern Mutual Life Insurance Company, supra*, which is made the leading case for a note in American Law Reports. See cases cited in note: *113 A.L.R. 606.*

SPECIFICATION OF ERROR NO. III. It follows from the preceding errors that the entry of judgment for the plaintiff was error, that the plaintiff's complaint should have been dismissed, and that judgment should have been entered for appellant.

CONCLUSION

Appellant submits that the default of the insured in payment of premium under the policy of insurance

has been established and admitted. The fact that the insured borrowed the maximum amount obtainable on his insurance a short time before the default in payment of premium is not in question. The appellant's claim is not one of foreclosure of the loan but rather one of declaring the policy lapsed for non-payment of premium. Under the non-forfeiture provisions of the policy and the clause on automatic loans which the insured elected, the question was resolved into one of whether interest on indebtedness could be deducted from the loan value. It is submitted that both the contract of insurance and the great weight of authority requires that all indebtedness, including interest to the date of default, be deducted.

The appellant is a mutual company. The officers and managing personnel of the appellant are merely servants of the company's policyholders. They have no interest other than to apply the law and the contract to each situation and to treat every policyholder alike. Hardships arise whenever a policyholder dies without having kept his insurance in force. In fact, hardships arise when people do not carry adequate insurance, but this cannot be the basis of decision. As a baseball umpire calls the balls and strikes, so in this case must the company and the courts apply the law and the contract to the facts. Seriously detrimental publicity was caused

from the Court's unwarranted castigation of the appellant in its opinion (Tr., pp. 27, 28). The appellant has acted in good faith and, we believe, in accordance with the law. It was shocked to be so treated without a discussion of the principles of law and with a statement that the judgment was given "even though I have been told other courts have held on the point at issue to the contrary."

It is respectfully submitted that the decision of the District Court should be reversed and that the appellant should be exonerated from the unwarranted cloud which has been placed upon its business integrity.

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No. 12330

In the United States
COURT OF APPEALS
for the Ninth Circuit

STANDARD INSURANCE COMPANY,
a corporation,
Appellant,

vs.

MABLE E. WISTING,
Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND 1-50

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APPELLEE'S BRIEF

On Appeal from the United States District Court for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION OF DISTRICT COURT AND THIS COURT

Appellee adopts Appellant's statement under heading "Jurisdiction and Pleadings" (Appellant's Brief, p. 1).

APPELLEE'S STATEMENT OF THE CASE

Appellee considers portions of Appellant's statement of the case (Appellant's Brief p. 2) inaccurate and the entire statement incomplete. Appellee, therefore, sets forth her own statement.

On May 26, 1927, Appellant issued to Appellee's husband a policy of life insurance promising to pay to the beneficiary of said policy upon due proof of his death while said policy was in force, the sum of $5,000.00. He died January 18, 1947; Appellee, his widow, was the beneficiary of the policy.

Due proof of death was furnished and demand was made. Appellant has refused to pay any sum whatsoever.

The anniversary of said policy was the 21st day of May of each year. During his lifetime the insured paid semi-annual premiums upon said policy for a period of nineteen and one-half years; the last premium payment was made on June 19, 1946, and was a semi-annual premium on said policy which was due on May 21, 1946. It was made during the grace period therefor.

On March 2, 1937, the insured borrowed $600.00 upon the policy; interest on this loan was paid each year on the anniversary of the policy when it became due according to the records of the Company; interest on this loan was never collected in advance but was always paid on the anniversary of the policy, May 21st. On October 28, 1946, the Company made an additional loan to the insured upon the policy. This loan was in the amount of $1394.00, and from the proceeds thereof the previous loan of $600.00 was deducted as well as interest at the rate of 6% upon said loan from May 21, 1946, until October 28, 1946. Thus on October 28, 1946, according to the records of the Company, there was an indebtedness against the policy in the sum of $1394.00.

Prior to obtaining this new loan, the insured executed a policy loan agreement in favor of the Company on a form furnished by it. This policy loan agreement provided that interest would be due upon said new loan on the next premium anniversary date of the policy which was May 21, 1947. On November 7, 1946, the Company mailed to the deceased a premium notice for the semi-annual premium due upon said policy on November 21, 1946. This notice set forth only the semi-annual premium due upon that date and contained no mention whatsoever of any interest due upon the loan. This premium was never paid.

On November 24, 1946, and during the grace period, the insured suffered a severe heart attack from which he died January 18, 1947.

The policy contained an automatic premium loan provision which provided that if a premium was not paid when due or within the days of grace thereafter the policy would remain in effect as long as the increasing loan value remained sufficient to pay for pro rata insurance for one additional day, on a quarterly premium basis, and to secure all existing indebtedness on the policy, with interest. There is no dispute as to these facts. (Finding III-XVI inclusive, Tr. pp. 15-18 inclusive.)

The trial court found as a fact (Finding XVII, Tr. p. 18) that under the automatic loan provision the increasing loan value of the policy would have continued the policy in force until January 23, 1947, five days after the insured's death. Appellant attacks this finding (Specification of Error IIa, Appellant's Brief, p. 10).

The specification does not state particularly wherein the finding is alleged to be erroneous.

The trial court also found that there was no provision in the policy permitting the company to charge accrued interest upon the loan against the policy before interest became due, that the company attempted to charge accrued interest on said loan against the policy before it became due, that the charge of accrued interest before it became due would have lapsed the policy prior to the death of the insured, and that no notice of any charge of accrued interest before it became due was given to the insured. (Findings XX, XXI, XXII, XXIII, Tr. p. 19.) It also found: "That said deceased knew that he did not have to pay interest on his policy loan until May 21, 1947. From his point of view, and in layman's thinking, the interest did not become an indebtedness until then. In the absence of notice to deceased, it would be unjust to permit the Company to put a different interpretation on 'indebtedness,' for the purpose of lapsing the policy." (Finding XXVIII, Tr. p. 20.) Appellant likewise attacks these five findings. (Specification of Error IIb, Appellant's Brief, p. 10). The specification does not state particularly wherein each or any finding is alleged to be erroneous.

Finding VI (Tr. p. 16) to the effect that the insured performed all conditions precedent to continuing the policy in force (Specification of Error Ia, Tr. p. 9) is also attacked but Appellant again fails to state wherein the finding is alleged to be erroneous. Quite obviously, if the policy was continued in force until after the insured's death by virtue of the automatic loan provision, the

finding is proper. This is in effect stated by Appellant in its argument (Appellant's Brief, p. 13).

The loan agreement which the insured executed prior to obtaining the loan of October, 1946 (Defendant's Exhibit 8, Tr. p. 69), stated when interest became due, that the loan could be repaid in whole or in part at any time, the only possible circumstances under which accrued or accruing interest could be charged so as to terminate the policy, that is with notice to the insured, and that all terms of the policy, except as modified by the loan agreement, remained in force. The court found:

> "That defendant did nothing to attempt to foreclose the policy under the provisions of the loan agreement particularly paragraph III. That defendant did not attempt to charge accrued interest thereunder and did not send notice of forfeiture thereunder." (Finding XXIV, Tr. p. 19.)

No objection is made to this finding.

Defendant's Exhibit 10 (Tr. p. 74) was introduced by Appellant at the trial of the case. Appellant's only witness, its secretary, testified that it represented the Company's calculation of the automatic loan against the policy and the various charges against it including premium charges. This exhibit is reproduced on page 8 of Appellant's Brief. It is the only evidence in the case which discloses the method of calculating the automatic loan value and the amount of premium to be charged against it. In this calculation Appellant attempted to charge against or deduct from said loan value interest on the loan of October 28, 1946, which was not yet due and would not be due until May 21, 1947. Computations using figures and methods identical to those used

by the Appellant in the preparation of this exhibit, but without deducting from the increasing loan value interest which was not yet due, disclose that Finding XVII (Tr. p. 18) is absolutely correct and that under the automatic loan provision the increasing loan value of the policy would have continued said policy in force until January 23, 1947. Therefore, unless Appellant had the right to deduct this interest, Appellee must prevail. This is the issue.

In view of Appellant's repeated erroneous statements about the way the amount of money that was loaned on October 28, 1946, was calculated we must point out the true facts as disclosed by the record in this regard. They are as follows: The loan agreement was prepared October 22, 1946; this date is indicated at the bottom of the loan agreement (Defendant's Exhibit 8, Tr. p. 69); the letter forwarding the loan agreement is dated October 22, 1946 (Appellant's Exhibit 8, Tr. p. 69). This letter stated that interest should be paid "on the next premium anniversary from the date of this loan, and annually thereafter"; it further stated that repayment might "be made in full or in part at any time." This letter contains a statement of the loan and indicates that from a loan of $1394.00 there was to be deducted the former loan of $600.00, together with interest thereon in the amount of $15.70 from May 21, 1946, until October 28, 1946, and that there would be a balance paid to the assured of $778.30. This letter is referred to because it shows that quite contrary to Appellant's assertion the insured did not delay in returning the loan agreement and that it was never contemplated that a

draft should be forwarded to him before October 28, 1946. Appellant's statement in its brief that the loan value of $1394.00 was calculated by deducting from $1401.00, the loan value as of November 21st, the amount of interest required for the period from the date of the loan to November 21st, to-wit, the amount of $7.00, and that the insured's delay in not returning the loan agreement until October 28th caused a credit in his favor on account of unearned interest is not supported by the facts. (Appellant's Brief, pp. 6 and 7.) The letter of October 22nd discloses that interest was calculated on the old loan up till and including October 28th and that the Company did not contemplate at any time delivering the funds to the assured prior to October 28th. Appellee in her argument will disclose how the figure of $1394.00 was reached.

Before concluding this statement Appellee wishes to note that Appellant in its statement devotes considerable space to contentions it asserts Appellee made at the trial and later abandoned. Although we disagree to a very substantial extent with Appellant's interpretation of our contentions at the trial and its statement that we abandoned them, no useful purpose can be served by further considering the matter. Those contentions are not before this court. The trial court made its findings and conclusions. Appellant has taken this appeal and stated the points upon which it relies (Tr. 36). Its brief should be thus directed.

Appellant contends that it had a right to charge accrued or accruing interest which was not due against the automatic loan value without giving the policy holder

any notice whatsoever. Appellee contends that it had no such right and that by so doing it in effect terminated the policy by foreclosure without notice. Appellant is on the horns of a dilemma. If it relies upon the provisions of the loan agreement, which was and is the only possible authority for a charge of accrued interest before it was due, it admits it foreclosed the policy without notice. If it does not rely upon the loan agreement, it is without any authority whatsoever to charge this accrued or accruing interest. It, therefore, ignores the loan agreement. Inasmuch as it had no possible authority to make this charge other than the loan agreement, the policy remained in effect under the automatic premium loan provision until the after the death of the insured.

SUMMARY OF ARGUMENT

Appellee will argue as follows:

1. Under the evidence produced at the trial and now before this court if interest which was not due was not deductible from the increasing loan value under the automatic loan provision the policy would have remained in force until January 23, 1947.

2. No interest was due on the loan until May 21, 1947.

3. In the light of the evidence this interest was not deductible from the increasing loan value.

4. Under the law applicable to policies with automatic loan provisions this interest is not deductible from the increasing loan value.

5. Cases and texts cited by Appellant which deal with extended insurance and not automatic premium loans are not in point and are not authority for Appellant's claim that this interest is deductible from the increasing loan value.

6. That Appellant's argument ignores the evidence and is generally unsound.

ARGUMENT

I.

Computations using identical methods and figures to those used by Appellant in its Exhibit 10 disclose that the policy would not have expired until January 23, 1947, if interest which was not yet due had not been deducted from the increasing loan value.

For the convenience of the court we reproduce Defendant's Exhibit 10 (Tr. p. 74) at this point.

GEORGE H. WISTING

POLICY NO. 34538

Cash value as of 5-21-46	$1,356.00	Policy Loan on 11-21-46	$1,394.00
Cash value as of 5-21-47	1,446.00	Loan interest due and unpaid from 10-28-46 to 11-21-46	5.16
Difference for year	$ 90.00		
		S-A Premium due 11-21-46	$66.05
No. of days from 5-21-46 to 11-25-46=188		No. of days from 11-21-46 to 11-25-46=44	
		——=% (S-A Basis)	
		182.5	

Amount of increase		Amount of premium due 11-21-46 to 11-25-46	1.45
$\frac{188}{365} \times \$90.00$	46.36	$\left(\frac{4}{182.5} \times \$66.05\right)$	
		Additional interest 6% on loan 11-21-46 to 11-25-46	1.81
Cash value as of 5-21-46	$1,356.00	$\left(\frac{4}{182.5} \times .06 \times \$1,394.00\right)$	
Total cash value 11-25-46	$1,402.36	Total loan outstanding 11-25-46	$1,402.42

Now using identical methods, figures and calculations we will set forth a computation omitting the charges for interest which was not yet due.

Cash value as of 5-21-46	$1,356.00	Policy loan on 11-21-46	$1,394.00
		S-A Premium due 11-21-46	$66.05
Cash value as of 5-21-47	1,446.00	No. of days from 11-21-46 to 1-22-47=63	
Difference for year	90.00	$\frac{63}{182.5}$=% (S-A Basis)	
No. of days from 5-21-46 to 1-22-47=247			
Amount of increase		Amount of premium due 11-21-46 to 1-22-47 inc.	
$\frac{247}{365} \times \$90.00 =$	60.90	$\left(\frac{63}{182.5} \times 66.05\right)=$	22.80
Total cash value on 1-22-47	$1,416.90	Total loan outstanding 1-22-47	$1,416.80

This computation discloses that the policy should have remained in force through January 22, 1947, the

total cash or loan value exceeding the loan outstanding on that date by approximately 10 cents.

The following identical table shows conditions on January 23, 1947:

Cash value as of 5-21-46	$1,356.00	Policy loan on 11-21-46	$1,394.00
Cash value as of 5-21-47	1,446.00	S-A Premium due 11-21-46	$66.05
Difference for year	90.00	No. of days from 11-21-46 to 1-23-47=64	
No. of days from 5-21-46 to 1-23-47=248		$\frac{64}{182.5}$=% (S-A Basis)	
Amount of increase		Amount of premium due 11-21-46 to 1-23-47 inc.	
$\frac{248}{365} \times \$90.00 =$	61.15	$\left(\frac{64}{182.5} \times 66.05\right)=$	23.16
Total cash value on 1-23-47	$1,417.15	Total loan outstanding 1-23-47	$1,417.16

This computation discloses that on January 23, 1947, the automatic loan against the policy exceeded the loan value by approximately one cent. We state, therefore, that using Appellant's figures and method of calculation but not deducting interest not yet due, the policy did not lapse until January 23, 1947, and was, therefore, in force on January 18, 1947, the date of the death of the insured. It should be noted that Appellant probably at one time so calculated for the reason that its own records disclose that the policy lapsed on January 23, 1947. In this connection we refer the court to Defendant's Ex-

hibit 8 (Tr. p. 69). A small pink slip in said file, which is apparently the Company's own record of the premium notice having been sent to the insured, recites on the back thereof as follows: "Lapsed 1-23-47." The yellow collection card in said exhibit likewise on the back thereof contains the following: "Lapsed 1-23-47." It should be noted that in each case the word "lapsed" is part of the printed form; 1-23-47 is written in pen and ink. No explanation was made of this entry at the time of the trial. When Plaintiff taxed Defendant with this fact in her brief in the trial court, counsel for the Defendant attempted to explain the entry by stating that the lapse was entered in the records on January 23, 1947. The explanation, it seems, imposes upon even the most credulous and stretches the point of coincidence far beyond any reasonable limitations. It seems more reasonable to assume that Appellant once calculated that the policy lapsed on January 23, 1947, and after receiving notice of the insured's death changed its mind.

We wish to emphasize again that Exhibit 10 was produced by the Appellant and vouched for by it; that it contains Appellant's figures and methods of calculation and is the only evidence before the court touching upon the matter. Appellee has built her case on this exhibit and has never questioned it except its deduction of interest which was not due. Appellant is not in a position to question it in any particular.

II.

No interest was due on the loan until May 21, 1947.

This statement is in accordance with Finding XIII (Tr. pp. 17-18). No objection is made to this finding.

In view, however, of the fact that Appellant in its brief is strangely silent as to when interest on this loan was due, we deem it advisable to review the evidence in this regard. First, the loan agreement quite definitely provided that no interest was due upon the loan until the premium anniversary date. It provided that the insured agreed "to pay the company on the next premium anniversary date of said policy interest on said loan at the rate of 6% per annum from the date of this agreement to said anniversary, * * * ." (Defendant's Exhibit 8, Tr. p. 69, Loan Agreement, paragraph 1.) The court definitely found that May 21st was the anniversary of the policy. (Finding IX, Tr. p. 16.) Appellant's only witness testified that the next anniversary date of the policy was May 21, 1947 (Tr. p. 81). That interest was due only on the anniversary date is further borne out by Plaintiff's Exhibit 3 (Tr. p. 66), being the receipt for the premium due May 21, 1946. This receipt shows the collection of a year's interest on the $600.00 loan, or the amount of $36.00, at that time. The premium notice which was mailed to the insured covering the premium due November 21, 1946, made no mention whatsoever of interest (Plaintiff's Exhibit 4, Tr. p. 76). In addition to this evidence, which shows that there was no interest due until May 21, 1947, and that the company never considered that any was due, we call the court's attention to a letter in the company file (Defendant's Exhibit 8, Tr. p. 69). This letter was written by the Company to Wisting and is dated June 29, 1945. It stated "In-

terest on a loan is payable but once a year on anniversary date of policy regardless of how premiums are paid".

In order to preserve an explanation of Appellant's which appeared in its brief in the trial court relative to certain notations on Defendant's Exhibit 9 (Tr. p. 74), Appellee caused portions of her memorandum brief and Defendant's memorandum to be included in the transcript of record (Tr. pp. 42-44, inclusive). This material shows that immediately upon making the loan of October 28, 1946, Appellant calculated the amount of interest which would be due thereon on May 21, 1947, and the annual interest thereon thereafter. This is at complete variance with any suggestion of Appellant that it contemplated any other method of payment of interest and at complete variance with its statement that the figure $1,394.00 was reached by deducting $7.00 interest from $1,401.00. The figure $1,394.00 was reached as follows:

Cash value 5-21-46 ..... $1,356.00

No. of days 5-21-46 to 10-22-46=155

Difference for year $90.00

$\frac{155}{365} \times 90.00 = 38.22$ (rounded off to 38.00)

$1,356.00
38.00

$1,394.00

It has been demonstrated without question that neither Wisting nor the Company ever considered that

any interest was due on this loan until May 21, 1947. Finding XXVIII is thus supported (Tr. p. 20).

III.

The evidence discloses that this interest which was not yet due was not deductible from the increasing loan value of the policy under the automatic loan provision.

In determining whether or not interest was deductible from the increasing loan value under the automatic loan provision it is proper to consider not only the policy but also the loan agreement and the remaining evidence in the case.

It is submitted that the language in said automatic premium loan provision "existing indebtedness hereon with interest" means interest which is due and not, as Appellant suggests, interest which would not become due for six months (Plaintiff's Exhibit 2, Tr. p. 66). There is not one word in said automatic premium loan provision permitting the Company to charge accrued or accruing interest before it is due. The only place accrued or accruing interest is mentioned is in the loan agreement, consideration of which Appellant so studiously avoids. This loan agreement (Defendant's Exhibit 8, Tr. p. 69) specifically provides as follows in paragraph 8 thereof:

> "8. All conditions, limitations, and requirements of said policy, except as expressly modified herein, shall remain in full force."

It further provides as follows:

> "3. Failure to repay said loan, with interest, as herein provided, or to pay any indebtedness on ac-

> count of said policy, or the interest thereon, shall not terminate the policy unless the total indebtedness thereunder, including accrued or accruing interest, shall equal or exceed the loan value of the policy at the time of such failure. In this event the policy shall terminate thirty-one days after the Company shall have mailed notice to the last known address of the Insured and any assignee of record, and be deemed surrendered in consideration of the cancellation of all indebtedness thereunder."

This last quoted paragraph of the loan agreement provided the circumstances under which accrued or accruing interest before it was due might be charged. In order to charge this accrued or accruing interest, if it could be charged thereunder, and cause the policy to be terminated on account thereof it was necessary for the Company to give the insured thirty-one days' notice. This the Company did not do. Therefore, accrued or accruing interest so as to forfeit the policy could not possibly be charged under this paragraph. Had the notice been given, the policy could not have been terminated until the expiration of thirty-one days. Under such circumstances the insured could have made a payment on the loan and the policy would still have been in force. In this connection the loan agreement provides:

> "2. The whole or any part of the indebtedness may be repaid at any time while the policy is in force."

It is submitted that if this notice had been given, the insured would have been advised of what the Company was doing and could have made a payment either on the premium or on the loan to keep the policy in effect.

Quite obviously, since he was on his death bed, a payment would have been made.

Appellant in its brief has stated on numerous occasions that it is contending that the policy lapsed for nonpayment of premium and was not forfeited for failure to repay a loan, or a portion thereof, or interest thereon. We could agree with this statement if Appellant were contending that the policy lapsed on January 23, 1947. If this policy lapsed prior to January 23, 1947, it lapsed because the Company foreclosed it without notice, contrary to the provisions of paragraph 3 of the loan agreement. Appellant cannot say that the policy lapsed prior to the death of the insured for nonpayment of premium when the lapse would not have occurred had it not attempted to foreclose the policy without notice. It is submitted that under the facts of this case the only possible authority for the Company to charge this interest before it was due was in paragraph 3 of the loan agreement, and that if it charged this interest under said paragraph, it attempted to foreclose the policy and forfeit the insured's rights thereunder without notice. This paragraph likewise limited any possible right Appellant might have had under the policy outside the loan agreement to charge said accrued or accruing interest.

IV.

Under the law applicable to automatic premium loan provisions, interest which is not due is not deductible from the increasing loan value so as to hasten the forfeiture of the policy.

The foregoing is an established principle.

> "Interest accrued but not due may not be added to the principal in determining whether the total indebtedness equals the cash surrender value of the policy so as to permit its forfeiture or cancellation." 44 C.J.S., Sec. 337, pp. 1290, 1291.

Unquestionably this is exactly what Appellant attempted to do in the instant case. This is undeniable, for most certainly if this interest could not be charged until after it was due, the policy would have been in effect at the date of the death of the insured. If it could be charged, the policy would have been forfeited prior to his death. Appellant cannot claim that this charge which it made did not hasten the forfeiture.

The case of *Walsh v. Aetna Life Ins. Co.* from the Pennsylvania Supreme Court (1945) 160 A.L.R. 620, 43 A. (2d) 102, is directly in point. In that case the court was concerned with an automatic premium loan provision similar to the one here, and in that case the company included in its calculation of indebtedness an item of interest upon a cash loan for a six months period, which interest was not yet due and would not become due until the end of the policy year. The court aptly concluded that this interest was not deductible. A condensed statement of the court's holding appears in headnote 3 of the report in A.L.R. as follows:

> "Where interest on a life insurance policy loan is not due and payable until the anniversary date of the policy, accrued interest not yet due may not be taken into account in determining whether the loan value has been equaled or exceeded, for the purpose of ascertaining the amount available as an automatic loan wherewith to pay a premium."

The policy in that case carried an automatic loan provision similar to the one in the case at bar and it was definitely decided that the loan value to pay said automatic premium could not be reduced by deducting therefrom interest which was not yet due. It is submitted that under the authority of this case and the law forbidding charges of interest which is not yet due in order to hasten forfeitures, Appellee's husband's policy was in force until January 23, 1947.

V.

Appellant's authorities are not in point.

Before quoting from any cases Appellant makes the statement that cases dealing with extended insurance as distinguished from automatic premium loans are authority supporting its position that interest not yet due was deductible from the increasing loan value in this case so as to hasten the forfeiture of the policy. A very substantial difference exists between cases where loan value less indebtedness is used to purchase extended term insurance and where it is used to keep the principal policy in force under automatic premium loan provisions. In the case of extended insurance the principal policy is terminated and extended term insurance is purchased. In the case of automatic premium loan provisions the principal policy is kept in force.

Reference to the policy in the instant case substantiates this statement. We quote in part from paragraph VI of said policy:

"VI. GUARANTEED SURRENDER OPTIONS.

"After three full years' premiums have been paid hereon, if any subsequent premium is not paid when due, the insured, upon surrender of this policy to the Company, and upon written request, both within the month of grace, shall be entitled to one of the following options:

* * * * *

"Third—EXTENDED INSURANCE. A participating term insurance policy payable at the same time and under the same conditions as this policy."

* * * * *

We also quote paragraph XIII thereof:

"Any indebtedness to the Company hereon will be deducted in any settlement hereunder upon the death of the Insured or in payment of any other benefit. If this policy shall lapse and there shall be an indebtedness hereon, the said indebtedness will be deducted from the cash value of the policy at date of default, shown in Column 1, and the balance will be (a) paid to the Insured in cash, or (b) applied to the purchase of a participating paid-up insurance policy, payable at death, or (c) applied to purchase a participating term insurance policy for the face amount of this policy less any indebtedness, at the request of said Insured and the surrender of this policy during the month of grace. If no such request is made the 'Automatic Premium Loans' benefit will be applied to this policy."

It is immediately quite apparent that in the case of extended term insurance the principal policy is out of existence. Under the automatic premium loan provision, which appears in Appellant's Brief on page 15, it is quite apparent that the principal policy remains in existence and that at any time while it is in force under

said provision the insured may resume payments without medical examination. Under these circumstances, if the insured had received notice of the termination from the Company as required by the loan agreement rather than a lapse letter on January 8, he could have resumed premium payments or paid something on the loan (Plaintiff's Exhibit 6, Tr. p. 72).

We will consider the two cases which Appellant cites.

In the case of *Reynolds v. Northwestern Mutual Life Insurance Company,* 298 Mass. 208, 10 N.E. (2d) 70, 113 A.L.R. 603, the reserve under the policy was $1,607.50. The amount of the loan was $1,575.00. The loan instrument recited that interest on the loan was "payable annually" and also contained a provision practically identical with paragraph 5 of the loan agreement before this court, to-wit:

> "5. If the policy be surrendered for Extended Term Insurance the then existing indebtedness shall be adjusted as provided in the policy, or in accordance with the Company's practice if the policy contains no provision relating thereto."
>
> Loan Agreement, Defendant's Exhibit 8 (Tr. p. 69).

The policy in the *Reynolds* case provided for extended term insurance in the event of default in the payment of premiums.

Quite obviously under the provision comparable to paragraph 5 in Appellant's form of loan agreement there was authority to adjust existing indebtedness when the policy became extended term insurance.

This provision in the *Reynolds* case under which the court held the company had a right to charge accrued interest not due in the case of extended term insurance has no application where the principal policy is continued in force under the automatic premium loan provision. The loan agreement in the instant case permits the adjustment only in the event the policy be terminated and changed to extended term insurance.

In the *Reynolds* case in the light of the fact that the loan agreement provided that accounts should be squared at the time extended insurance became effective, the court construed the term "payable annually" to mean capable of being repaid. Incidentally, in the loan agreement before this court the words "payable annually" are not used. The loan agreement before this court provides "to pay the Company on the next premium anniversary date". The court in the *Reynolds* case stated that the fact that the policy provided that a loan "may be repaid at any time while this policy is in force, except as extended term insurance" indicated that accounts were to be squared before the extended term policy was issued. The court in the *Reynolds* case also stated as its conclusion that the term "payable annually" in the loan agreement had no application "to the adjustment of accounts incident to the conversion of the original insurance into extended term insurance". The court in the *Reynolds* case made it quite clear that a far different situation from the situation in the instant case, where the original policy remains in full force and effect and where premiums may be resumed any time and the loan may be repaid in whole or in part

at any time, is presented when the original policy becomes nonexistent by virtue of the fact that it is cancelled and a policy of extended insurance is issued.

In the case of *Garrett v. Northwestern Mutual Life Insurance Company,* 111 Ind. App. 502, 38 N.E. (2d) 74, Appellant likewise quotes from a case in which the reserve was to be used to purchase extended insurance. The principal policy was terminated and extended insurance purchased. Obviously the court concluded that in such a situation accounts upon the old policy should be squared. We quote from the opinion of the court:

> "We think the clear intent is that interest on any loan shall be determined to the date of the default and a complete balance of accounts on account of the policy be made in finding the amount available to purchase extended insurance."

Appellant's quotation from Appelman likewise deals with extended insurance. It is quite clear that the cases on extended insurance do not apply to situations where the automatic premium loan provision is considered.

VI.

General discussion.

Before concluding we wish to call to the court's attention certain very well recognized principles which are so well known that they need no citation of authority to support them.

It is well known that insurance contracts should be construed liberally in favor of the insured and strictly against the insurer. *Stipcich v. Metropolitan Life Ins.*

Co., 48 S. Ct. 512, 277 U.S. 311. It is likewise well known that in case of ambiguity construction of a policy will be adopted which is most favorable to the insured. *Mutual Life Ins. Co. of New York v. Hurni Packing Co.,* 44 S. Ct. 90, 263 U.S. 167, 68 L. Ed. 235, 31 A.L.R. 102. *New York Life Ins. Co. v. Hiatt,* 140 Fed. (2d) 752 (Ninth Circuit).

Statements of general principle such as these and also the well known general principle that forfeitures are not a favorite of the law clearly establish that Appellee is entitled to prevail in this appeal and that this court should hold that the Company had no right to deduct from the increasing loan value under the automatic premium loan provision of the policy any interest which was not yet due, and that in attempting to deduct this interest which was not yet due Appellant violated the positive provision of the loan agreement and actually caused a forfeiture of the policy by a foreclosure without notice.

CONCLUSION

It has been definitely established that if the Company had not charged interest before it was due against the increasing loan value, the policy would have been in force at the time of the insured's death. It has been further established that the only possible authorization to charge this interest was under the loan agreement and that if it was charged under said agreement, notice to the insured was required to be given. It has likewise

been definitely established that no notice of any such charge was ever given to the insured. Therefore, Appellant's effort to cause the policy to be forfeited prior to the insured's death by making this charge is unavailing, and in computing the length of time the policy remained in force this interest not yet due cannot be taken into account. It is the law that charges of accrued interest to hasten forfeitures are not permitted and that in calculating the amount available for an automatic premium loan interest charges not yet due will not be deducted. Cases dealing with extended insurance are not in point.

After hearing all the evidence in this case and reaching its decision, the trial court rendered a memorandum decision. It was not until Appellant tried to re-argue the case on its objection to the findings submitted by Appellee and to request findings that were entirely unsupported by the evidence that the trial court saw fit to make certain observations which Appellant did not enjoy. Any castigation that Appellant may have received therein was brought about by Appellant alone.

It is respectfully submitted that the case should be affirmed and Appellee allowed an additional attorney fee for services in this court.

Respectfully submitted,

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Attorneys for Appellee.

No. 12330

In The

United States Court of Appeals

For the Ninth Circuit

STANDARD INSURANCE COMPANY,
a corporation, *Appellant*

vs.

MABLE E. WISTING, *Appellee*

Reply Brief of Appellant

On Appeal from the United States District Court
for the District of Oregon

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In The United States Court of Appeals For the Ninth Circuit

STANDARD INSURANCE COMPANY,
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Reply Brief of Appellant

On Appeal from the United States District Court for the District of Oregon

ARGUMENT

Appellee in her brief insists that Appellant's opening statement is an inaccurate account of the method used by the Company in computation of the amount of the loan which was dated October 25, 1946. The appellant's explanation is the one given by the officers of the Company who made the calculation, and it is submitted that it is correct. However, the variance in this regard is immaterial, because

the rights of the Appellee rest upon the written contracts consisting of the policy of insurance and the policy loan agreement of October 25, 1946. We can therefore start from this premise, that there was a policy loan against the policy in question amounting to $1394.00 upon which interest accrued from October 25, 1946.

Next we wish to point out, that throughout Appellee's brief it is assumed or stated that Appellant seeks to avoid the policy by foreclosure of the loan without thirty-one days' notice. See the following statements in Appellee's Brief: on Page 4:

> "No notice of any charge of accrued interest before it became due was given to the insured."

Again on the same page:

> "In the absence of notice to deceased it would be unjust to permit the Company to put a different interpretation on 'indebtedness' for the purpose of lapsing the policy."

On Page 5 Appellee quotes from Finding XXIV:

> "That defendant did nothing to attempt to foreclose the policy under the provisions of the loan agreement, particularly Paragraph III."

At the top of page 8 Appellee concludes:

> "* * * it in effect terminated the policy by foreclosure without notice."

At page 16 Appellee quotes the foreclosure provision of the policy loan agreement and concludes:

> "* * * it was necessary for the Company to give the insured thirty-one days notice."

At the risk of seeming importunate, appellant refers to its opening brief at the bottom of page 13 where it was stated:

> "* * * Appellant does not contend and never has contended that the policy lapsed by reason of the foreclosure of the loan against it. On the other hand, it has always been and now is contended by the Appellant that the policy lapsed for failure to pay the premium of November 21, 1946."

Avoidance of the policy by foreclosure of the loan and lapse of the policy for non-payment of premium are two separate and distinct rights of the Company and have so been recognized by many authorities. Appellant has already cited *Pacific Mutual Life Insurance Co. v. Davin,* 5 Fed. (2d) 481, wherein, on page 483, the Court stated:

> "It is admitted that no notice of foreclosure for non-payment of the note was ever sent nor was any required. The policy was not forfeited for the non-payment of the note. What happened was that the premium fell due on the 2nd day of June, 1923. It was not paid at that time nor during the thirty-one days of grace."

See also *Moss et al v. Aetna Life Insurance Company,* 73 Fed. (2d) 339, at Page 340, where the Court stated:

> "It has uniformly been held that the loan and forfeiture provisions do not modify or in any way affect the avoidance of the policy for failure to pay premiums thereon. When there is a failure to pay a premium when it is due the policy becomes void except for the automatically extended insurance but where there is no reserve or loan value in the policy it having been exhausted by the discharge of an indebtedness thereon 'the loan agreement and all incidents * * * become non-existent—a Chapter finished and closed'." (Citing numerous authorities.)

The question before this Court resolves itself into this: The premium due November 21, 1946 was not paid. The days of grace expired December 21, 1946. The policy then lapsed unless, under the non-forfeiture provisions of the policy, some value remained which would carry the policy beyond the date of death, which occurred January 18, 1947. Here, and for the first time, the status of the loan became material. At this point it was necessary to ascertain what values the insured had in the policy which might be used under the non-forfeiture provisions. Since the insured had elected the automatic loan option, we can discard the other non-forfeiture options. It is also clear that the loan value was not sufficient to pay a full premium, either annual,

semi-annual or quarter-annual. Therefore, the matter was narrowed to the provision contained in Paragraph VI of the policy, which reads:

> "This policy shall remain in force and effect as long as the increasing loan value hereof including the loan value of any dividend additions then in force is sufficient to pay for pro-rata insurance for one additional day on a quarterly premium basis and to secure all existing indebtedness hereon, with interest."

It then became necessary to ascertain the latest date upon which value would remain in the policy to pay for an additional day. For that purpose the insured was credited with the cash value, increase pro-rata to the final day, and he was charged with indebtedness to that date, because the Company is entitled under the above provision, to have security for all existing indebtedness with interest. When that indebtedness, with interest, was deducted on that final day, no loan could be made, because the indebtedness, with interest, to that day exceeded the loan value increased to that day. As shown by Appellant's computations, particularly Exhibit 10, also set forth on page 8 of Appellant's Opening Brief, that final day when all value was consumed was November 25, 1946. However, the days of grace for payment of the premium then past due did not expire until December 21, 1946.

There was no attempt at any time to foreclose the loan or to collect the interest. It was purely and simply a question of ascertaining whether there was any loan value to make an additional loan. The Company was entitled at all times to keep itself secured on existing loans with interest accrued to date.

Appellee attempts to brush off, as inapplicable and not important, all authorities cited by the Appellant in its opening brief. Appellant, therefore, gives consideration to Appellee's citation of authorities concerning interest on the loan and the relevancy of such authorties to the question before the Court.

At the top of page 18 of Appellee's brief, a quotation from *44 C.J.S., Sec. 337, pp. 1290-1291,* is set forth. This sentence, taken out of context, might seem to be pertinent to the issue before the Court; but it is a part of a section dealing with loans on policies and foreclosure thereof rather than with the question of non-payment of premium. Cited by C.J.S. under a note to the Appellee's quotation, are three Pennsylvania cases and an Arkansas case. They are all foreclosure cases. For instance, *New York Life Insurance Co. v. Shively*, 69 S.W. (2d) 392, 188 Arkansas 1044, was the case of a paid up policy on which the loan continued to run until the interest accumulated to the point where the total indebtedness exceeded the cash value of

the policy. This required the foreclosure of the loan in order to avoid the policy; and we agree that, in case of the foreclosure of the loan, there would have to be a due date on loan or interest in order to work the foreclosure. But this is wholly different from the situation which we have in the present case, where all values and obligations are accrued to a fixed date to ascertain what additional loan value may exist.

The second authority cited by Appellee, and the only one which we have found with any language supporting Appellee's contention is the case of *Walsh v. Aetna Life Insurance Company,* 160 A.L.R. 620, 43 Atl. (2d) 102. The head-note quoted purports to support Appellee's position, but analysis of the opinion shows that the case was decided upon a question of fraud and wrongful termination of the policy. Furthermore, the decision was against the insured and his beneficiary and in favor of the Company. Thus the headnote quoted was only *obiter dictum.* Appellant has carefully examined the cases cited as authority by the Pennsylvania court in the Walsh decision. One of the three cases principally relied upon is *Senin, Adm'r. v. Metropolitan Life Insurance Company,* 153 Pa. Super 658, 34 Atl. (2nd) 910. This was an action on two policies of insurance, only the second policy being of interest here. The policy was for paid-up insurance, and the insurer attempted to foreclose for non-payment of a loan plus

interest. The Pennsylvania Superior Court (intermediate court of appeals) decided the issue upon the ground of waiver, in that the company, having the right to demand interest in advance, failed to do so, and therefore waived its right to demand prior to the due date, and, upon non-payment, to cancel the policy. The other principal cases, *Roeser v. National Life Insurance Company,* 115 Pa. Super 409, 175 Atl. 887; *New York Life Insurance Company v. Shively, supra,* relied on in the Walsh decision, are identical. Each involved a paid-up policy, and the insurer sought to foreclose the policy for non-payment of loans plus interest. In each case, the Court found it unreasonable for the insurer to accrue interest, but to refuse to accrue cash value. Therefore, by construing the policies strictly against the company, the interest did not accrue, inasmuch as the cash value did not accrue. Clearly, these cases are not in point, for in the present case, the Appellant waived no rights and carefully accrued cash value and interest at the same time.

It is apparent that Appellee's authorities, such as they are, deal with foreclosure of loans; and the only judicial statement which could support Appellee's contention, namely, the Walsh case, *supra,* was *obiter dictum.* Appellee relies on a portion of one section in Corpus Juris Secundum. It would be well to read further.

See *45 C.J.S., Section 590,* at Page 389:

"The general rule is that a provision for forfeiture or suspension of the policy for default in the payment of premiums or assessments is self-executing and unless the necessity is imposed by statute or the conditions of the contract or by course of dealing, no affirmative act on the part of the insurer such as notice of forfeiture is necessary."

See also *45 C.J.S., Sec. 614,* at page 448:

"A forfeiture for non-payment of premium is not affected by a provision for forfeiture in the event that any indebtedness against the policy equals or exceeds its cash surrender value."

See also *45 C.J.S., Sec. 636,* page 497, where, in dealing with non-forfeiture rights, it is stated:

"However where the right is based on the reserve or loan value of the policy it is lost where such value is exhausted."

See also *45 C.J.S., Sec. 638,* at pages 529 and 530:

"Interest on the loan or advance may be deducted from the fund otherwise available for the purchase of extended insurance. Such interest is deductible to the date of default in the payment of a premium notwithstanding, had there been no default, interest would not have been actually due and payable until some subsequent time."

See also *45 C.J.S., Sec. 640,* page 543, regarding surrender value:

> "In determining the amount of the surrender value insurer generally is authorized to deduct an indebtedness from insured to insurer and this usually includes any indebtedness on account of premium notes, interest or loans."

Appellant has already cited 113 A.L.R. and again calls attention to the cases listed on pages 630 and 631 supporting Appellant's contention that interest must be accrued to the date of the computation of the reserve. Appellant has attempted, through the citators and the American Digest System, to locate some case or cases presenting the exact situation under a similar automatic premium loan provision. Most cases which have arisen under non-forfeiture provisions of polices have been either cases involving surrender of policy for the cash value or cases involving conversion of the reserve into extended or paid-up insurance. A great many of these cases will be found under *Insurance, Key No. 367, (2), C* in the *Fifth Decennial Digest;* but apparently the automatic loan provision is of such recent usage by insurance companies that it has not been very many times in litigation. It is submitted, however, that at the effective date of the non-forfeiture options the computation of the amount of reserve avail-

able either for cash surrender, paid up insurance, extended insurance or for automatic loan to pay premiums must be identical, because, at that time, the Company is entitled to either be paid or secured upon all indebtedness before applying the balance of the reserve to any of these non-forfeiture options. That is the contract, and that is the way the Courts have interpreted it. The case of *Reynolds v. N. W. Mutual Life Insurance Co.*, 298 Mass. 208, 10 N.E. (2d) 70, 113 A.L.R. 603, appears to be the leading case and is the one most often cited upon this question. It is submitted that, if a different rule for computation of reserve applicable to non-forfeiture provisions is to be made in the case of automatic loans, then it will be necessary to distinguish the long lines of authority applying to the computation of reserve values in cases of surrender value, paid up insurance and extended insurance.

It is deemed unnecessary to analyze Appellee's computations set forth on pages 9, 10 and 11 of Appellee's brief. The only substantial difference between them and Appellant's computations is that Appellee does not allow the company credit for accrued interest to the date of the automatic loan. That is where the issue is joined.

One other matter in Appellee's Brief requires reply. At the top of Page 12, Appellee refers to a pink slip in the Company's file and the collection card, on which, in

long hand, appeared "lapsed 1-23-47". These items appear in the dossier of the Company covering this policy. The whole record was brought to the trial and was introduced in evidence. Long hand notations on the copy of the last premium notice and on the collection card referred to the date when this dossier was closed and the date when the policy in question was registered in the register of lapsed policies. It could not, and does not, have any bearing on the contract of insurance or the time of its lapse. The policy contract and the loan agreement fix the rights of both the Company and the insured. A clerk's notation on the collection card would no more establish the rights existing between the parties than would a memorandum made by the insured in his diary or desk calendar. Furthermore, the notice sent by the Company and the letter of January 8, 1947 mailed to the insured clearly show that the Company never at any time considered January 23, 1947 as the date upon which the policy lapsed.

In conclusion, Appellant wishes to make it clear that it does not disagree with the principal of law that, in case of ambiguity, the policy should be liberally construed in favor of the insured. At all times that has been the policy of the Company; but it is believed that there is no ambiguity and that the contract means exactly what is says, namely, that the Company is entitled to be secured for all

indebtedness, with interest. In a business such as that in which the Appellant is engaged, it is necessary to establish definite policies and procedures. The fairest method of dealing with policy holders is to treat every one of them alike. The date of lapse should be definite and certain and not contingent upon hardship or sympathy for either party.

The evidence will show that the Company paid to the Appellee the death benefits under two much larger policies than the one in question. Those policies had been kept alive by the insured; but the Company believes, and a reasonable inference can be drawn from the evidence, that the insured intended to drop the policy involved in this suit when he borrowed the maximum value. It is respectfully submitted that the Company has fairly and correctly dealt with the Appellee, that the Company's interpretation of the contract under the great weight of authority was correct and that the decision of the Trial Court should be reversed.

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